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Wisconsin Judicial Benchbook Volume IA: Criminal and Traffic

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C. Defense misconduct

D. Prosecutorial misconduct

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A. Unless Ct finds “manifest necessity” to terminate trial over Def’s objection, State is barred from retrying case

B. Mistrial manifestly necessary when

C. Mistrial not manifestly necessary—and retrial barred—when Def objects to mistrial and:

D. Ct’s reasoning for granting mistrial is in error, for example, faulting Def for calling undisclosed alibi witness when witness called by Def was not alibi witness, or finding that contemptible behavior of Def counsel necessitated mistrial when counsel’s behavior was not contemptible

E. Mistrial is not manifestly necessary if reasonable alternative to mistrial is available, such as continuance or curative instruction

F. In general, manifest necessity test does not apply, and Double Jeopardy Clause does not bar retrial, when Def successfully moves for mistrial based on reasons other than prosecutorial overreaching or laxness

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A. When Def offers to concede element of offense to avoid introduction of other acts evidence (referred to as Wallerman stipulation), Ct and State have discretion whether to accept such concession, even if stipulation complies with Wallerman four-part test

B. When evidence of prior conviction is necessary solely to prove element of prior conviction (a Def’s status), Ct and State cannot refuse Def's offer to concede prior conviction

3. Motion to Dismiss at Close of State’s Case

A. Motion must be denied if, considering State’s evidence in the most favorable light, the evidence adduced, believed, and rationally considered, is sufficient to prove guilt beyond a reasonable doubt

B. Ct should not reserve ruling, but should decide motion before Def decides whether to present evidence

C. Def waives right to challenge denial of motion on appeal if Def introduces additional evidence; if Def presents evidence, sufficiency of the evidence is determined on all the evidence presented, not just the State’s

4. Colloquy with Def about Testifying or Not Testifying

A. Def has due process and 6th Amendment right to testify

B. Ct must conduct colloquy with Def to determine whether

C. Record must support knowing, intelligent, and voluntary waiver

D. Failure to conduct colloquy requires evidentiary hearing to determine whether waiver was valid

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A. Appellate courts discourage sidebar conferences, if no contemporaneous record is made

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B. Def must be present or any party can petition the Ct to appear by telephone or live audiovisual means

C. Def has right to counsel

D. Establish repeater status, see Secs. 2 and 3 below

E. Determine restitution, see Sec. 10 below

F. PSI must be available to DA, Def, and Def's Atty before sentencing; thereafter confidential

G. DA, Def's Atty, and Def may make statement on any matter relevant to the sentence

H. Statements by others

I. Judge to consider all information properly presented on notice with opportunity to be heard

J. Quasi-administrative setting in which many trial-like procedural safeguards do not apply

K. Ct must inquire of Def why sentence should not be pronounced

L. Exercise discretion, see Sec. 4, below

M. Pronounce judgment and impose sentence, see Sec. 7, below

N. State reason for sentencing decision in open court. See Sec. 7 below

O. Inform convicted felon of prohibition against possession of firearm and of consequences

P. Inform convicted felon of prohibition against possession of body armor and of consequences if conviction is for violent felony as described in § 941.291(1)(b)

Q. Award or deny sentence credit, see Sec. 9 below

R. Upon any criminal conviction, DNA sample required, if not already on file with DOJ

2. Habitual Criminality (Repeater) Penalties

A. Enhancer requires a felony conviction or 3 misdemeanor convictions in 5 years preceding current crime, excluding time in actual confinement serving a sentence

B. Repeater status under § 973.12(1) must be established by personal admission of Def or by evidence at sentencing hearing before imposition of sentence (if not established at plea hearing)

C. Enhanced penalties for habitual criminality do not violate double jeopardy as additional penalties for earlier offense

D. 3-strikes law is not cruel and inhuman and does not abridge separation of powers or violate equal protection, nor is it arbitrary in creating a class of offenses

E. 2-strikes child sex offense law (§ 939.62(2m)) does not offend substantive due process

F. Habitual criminality (repeater) statutes do not authorize Ct to impose 2 separate sentences for one offense; impermissible to impose one regarding the offense and the other regarding the repeater status

G. Repeater allegation cannot be added after Def has entered not guilty plea to complaint or information that does not contain repeater allegation

H. "Prior conviction" for purposes of enhanced penalty provisions occurs upon finding of guilty, even before sentencing

I. Calculation of enhancement time for attempt equals ½ sentence for the crime as if completed, plus enhancer

J. Enhancer increases term of confinement of felony and overall length of enhanced misdemeanor (But § 973.01(2)(c)1. not applicable to misdemeanors)

K. Repeat criminality (§ 939.62) or second or subsequent drug offense (§ 961.48) enhancer can be applied, but not both

3. Persistent Repeater

   A. Ct must make own finding that out-of-state crime is comparable to Wis serious felony

4. Exercising Sentencing Discretion

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   C. Imposing concurrent or consecutive sentences

   D. Imposing sentence after revocation of probation

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   A. DA may stipulate with Def to read additional uncharged or dismissed offenses into record

   B. In plea colloquy, Ct should establish that Def acknowledges responsibility for read-ins, that read-ins may be considered in sentencing, and that Def accepts responsibility for restitution regarding read-ins

6. Presentence Reports

   A. May be ordered in Ct's discretion in all felonies and in certain specified misdemeanors

   B. Def has due-process right to read PSI before sentencing notwithstanding § 972.15(2)

   C. PSI shall be confidential after sentencing and may be released only upon specific authorization of the Ct, EXCEPT:

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9. Sentence Credit

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   B. Credit given for time in custody in connection with course of conduct for which Def sentenced, including time spent unable to make bail

   C. A day of sentence credit for each calendar day during which Def spent at least part of the day in custody

   D. Credit not given

   E. Def to receive day-for-day credit for all jail time against total incarceration for same course of conduct for which ultimately sentenced

   F. Credit given for confinement on charges dismissed and read in at sentencing

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A. Must be in writing and signed by clerk or Judge

B. Must set forth plea, verdict or finding, adjudication, sentence, and sentence credit

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D. Ct may submit "Sentenced Offender Report" with copy of "Judgment of Conviction" to provide DOC with sentencing information and recommendations on treatment needs of Def

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A. Required by statute no matter what plea or sentence

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A. Sentencing Ct may stay execution of sentence of imprisonment or to intensive sanctions program only

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C. Contraband may not be returned

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C. Deferred prosecution agreement must be in writing signed by DA or designee and Def

D. Deferred prosecution agreements may be used for crimes other than those listed under § 971.37(1m)

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2. Expunction

A. Ct may order expunction of record of conviction of Class H felony or lesser offense upon completion of sentence if determines

B. Expunction not available:

C. Ct shall order at time of sentencing that the record be expunged upon successful completion of sentence if

D. Successful completion of probation (or imprisonment) entitles Def to expunction

E. To expunge Ct record, Clerk of Ct must remove any paper index and nonfinancial Ct record and place in case file; electronically remove any automated nonfinancial record, except case number; seal entire case file; and keep for retention

period appropriate for case type

F. Expunged record is only Ct record, not DA or police record

G. 2009 amendment of § 973.015 applies only for sentences ordered on and after July 1, 2009

H. Ct may grant expunction only at time of sentencing, not after review of performance of sentence

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C. Compliance may be excused by Ct if Def was less than 19 years old and offense was nonforcible sexual assault with victim who was less than 4 years younger or less than 4 years older than Def

D. If Ct finds conduct sexually motivated (§ 980.01(5)) and registration is in interest of public protection, compliance with reporting under § 301.45 may be required for violations of:

E. Def must be convicted of qualifying offense. Dismissed or read-in offenses, by themselves, do not qualify

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EXTRADITION

1. Nature and Purpose of Proceedings

A. Surrender on demand by Governor of one State to Governor of another of person charged with or convicted of offense in demanding State

B. To prevent escape of person charged with or convicted of offense and to provide for return to jurisdiction from which person fled from prosecution or punishment

C. Purpose of extradition is to provide a summary and mandatory proceeding

2. Controlled by Federal Law

A. Federal extradition law

B. Uniform Criminal Extradition Act

3. Arrest Before Governor's Warrant or Requisition

A. Requirements for lawful arrest

B. Initial appearance to await requisition

C. Waiver of extradition hearing

4. Arrest Under Governor's Warrant or Requisition

A. Form of demand

B. Asylum State Governor may investigate case

C. Issuance of warrant

D. Arrest on Governor's warrant

5. Scope of Habeas Corpus Review

A. To test legality of detention under Governor's warrant of the asylum State

B. Asylum Ct may inquire into four questions

C. Limitation in scope reflects conflict of two basic principles of law

D. Restrictions on habeas corpus review of extradition proceeding

E. Def has right to evidentiary hearing on claim that not fugitive from justice

F. Ct should not consider following

6. Findings

A. If custody found lawful, quash habeas corpus and return Def to custody of sheriff for relinquishment to demanding State under Governor's warrant

B. If custody found unlawful, discharge Def from custody

DETAINERS

1. Definition

A. Detainer is notification

B. Wis has adopted separate procedures to deal with

2. Interstate Procedure

A. Commencement

B. Time limits

C. Any time running for the parties to pursue an appeal not included in calculating time limits

D. Hearing

E. The literal language of the anti-shuttling provision of the Interstate Agreement on Detainers bars any further criminal proceedings when Def returned to original place of imprisonment before trial

3. Intrastate Detainer Procedure

A. Procedures substantially similar to procedures on Interstate detainers

B. Ct has discretion to dismiss with or without prejudice for noncompliance with time limit

CR 45: ELECTRONIC SURVEILLANCE

1. Constitutionality

A. Electronic surveillance control law valid enactment that meets 4th Amendment and all other constitutional requirements

B. Surveillance control law premised on concept of controlling law enforcement's conduct to protect citizens' privacy rights

2. Procedure

A. Application

B. Contents of application must conform to statute, including

C. Hearing

D. Order

E. Time period of authorization

3. Recording Interceptions

A. If possible, recorded on tape, wire, or comparable device

B. Recording filed with Ct issuing order, sealed, and kept in Ct's custody

C. Preserved for 10 years and destroyed only on order of issuing Judge

D. No disclosure except by order of Ct for good cause

E. Concealed radio transmitters may be used

4. Inventory (Notice) to Person Monitored

A. Served on persons named in order or application and other parties to interception

B. Service within 90 days after filing of application or termination of period of order or extension(s) thereof

C. Contents of inventory

5. Pretrial Use of Intercepted Communications

A. Prosecutor may include contents of legally intercepted communications in criminal complaint

6. Trial Use of Intercepted Communications

A. Parties must be furnished with copy of Ct order and application at least 10 days before trial, hearing, or proceeding

B. Judge may waive notice, if

C. Motion to suppress intercepted communication (or evidence derived from the communication) may be made before trial on following grounds

D. State has right to appeal from order suppressing intercepted communications

7. Effect of Consent of One Party to the Communication

A. Recorded (intercepted) one-party consent communication may be disclosed in any felony Ct proceeding

B. EXCEPT when plain hearing doctrine applies

C. In non-felony proceedings, evidence obtained from one-party consent search cannot be admitted in evidence in case-in-chief, but can be turned over to law enforcement officials

D. Intercepted recorded conversation with consent of one party not violative of federal Constitution

E. Testimony concerning content of tape recording is admissible

CR 46: WRITS

1. Certiorari: See Civil Benchbook CV 26

2. Habeas Corpus: See Civil Benchbook CV 27

CR 47: CONTEMPT OF COURT

1. Power of Court

A. Ct of general jurisdiction has inherent power to hold those who disobey its lawful order in contempt

B. Ct's power subject to reasonable legislative regulation and limitation

C. Juvs may be held in contempt

2. Definition of Contempt

A. Intentional misconduct in presence of Ct

B. Disobedience, resistance, or obstruction of authority, process, or order of Ct

C. Refusal of witness to appear, be sworn, or answer question

D. Refusal to produce record, document, or other object

3. Summary Proceedings

A. Requirements for using summary contempt powers

B. In general

C. Procedure

D. Ct must make specific findings

E. Sanctions available

4. Non-Summary Proceedings

A. Remedial sanctions

B. Punitive sanctions

CR 48: GRAND JURY/JOHN DOE PROCEEDINGS

GRAND JURY

1. Purpose

A. To discover wrongdoing and, upon sufficient evidence, to accuse individuals by indictment so that proper prosecution of offenders may occur

B. Investigates whether crime committed and by whom

2. Powers

A. Prosecution may investigate merely on suspicion that law being violated

B. May investigate just because Grand Jury wants assurance that law not being violated

C. Free to pursue investigations unhindered by external influence or supervision

D. Grand Jury convened to investigate allegations of criminality against specific person does not deny that person due process

3. Convening

A. DA usually makes written application or petition containing

B. Written order entered by Judge to Clerk of Circuit Ct requiring Clerk to select Grand Jury panel list within specified reasonable time

C. Grand jurors serve for 31 consecutive days

4. Participants

A. Judge orders jurors summoned and supervises

B. DA has duty to attend whenever required by Grand Jury

C. Grand Jury selects presiding juror and clerk

D. Employs one or more reporters

5. Secrecy

A. Grand Jury proceedings may be secret during pendency of proceedings

B. Grand Jury proceedings need not be recorded, unless so ordered at direction of Judge

6. Witnesses

A. Usually subpoenaed

B. Sworn to secrecy and to tell truth by DA or presiding juror

C. Subpoena to appear not seizure within meaning of 4th Amendment even though inconvenient or burdensome

D. Witness has absolute duty to answer all questions, subject only to

E. Claim of privilege against self-incrimination

F. Compelling testimony/grant of immunity

G. Right to Counsel

H. Witness may be extradited to Wis to testify from another state that is a party to the Uniform Act for Extradition of Witnesses in Criminal Actions

7. Indictment

A. Indictment is formal accusation of a crime, presented to a Ct for prosecution against accused person

B. Indictment properly returned when evidence presented excites in jury's mind, after careful consideration, honest, reasonable belief that accused committed offense charged

C. Indictment must be agreed to by at least 12 jurors

D. Upon indictment, complaint issued

E. No indictment charging a felony may be filed until noncorporate Def has had prelim

JOHN DOE PROCEEDINGS

1. Definition and Initiation

A. Proceeding conducted by a Judge to determine whether certain crimes were committed and by whom

B. "Judge" does not include a "reserve Judge"

C. John Doe proceeding not proceeding in Ct of record and John Doe Judge not equivalent of a Ct

D. Doctrine of separation of powers set forth in Wis Constitution not violated by Judge performing both investigative and judicial duties

E. Initiated by any person, sworn or unsworn, who complains to Judge that person has reason to believe crime committed within Judge's jurisdiction

F. Not necessary that name "John Doe" be used, and actual person's name may be used in subpoenas

G. Proceeding to last no more than six months, but may be extended

2. Role of Judge in John Doe Proceedings

A. Initial role of Judge to determine whether complainant has "reason to believe" crime was committed

B. If petition is filed by DA, Judge shall convene a John Doe proceeding

C. If a petition filed by someone other than a DA, Judge shall, upon finding "reason to believe," refer matter to DA

D. Must conduct self as neutral detached magistrate in determining probable cause

E. Affirmative duty to examine complainant and those witnesses that the Judge determines to be necessary and appropriate to ascertain whether a crime was committed and by whom

F. Secrecy of proceedings

G. If immunity to be granted, motion of DA and actual grant of immunity must be in open Ct

H. Compelling testimony

I. Access to testimony

J. Any search warrants related to the proceedings must be issued by a different Judge

3. Disposition

A. In matters petitioned by others than a DA, Judge may issue a complaint if Judge finds sufficient credible evidence to warrant a prosecution

B. Judge other than Judge hearing testimony may issue complaint

C. Warrant issued for arrest of accused

D. Findings of Ct should be made on record

4. John Doe Problems

A. John Doe investigation limited to subject matter of complaint on which proceedings commenced, and thus relevancy issues arise

B. Sec. 968.26 grants power to issue subpoenas but does not specifically authorize John Doe Judge to force compliance

C. If DA did not make complaint or refuses to assist, or if DA's office involved, may have to appoint Special Prosecutor

D. Even while a John Doe proceeding is in progress, the DA maintains the ability to issue a complaint

E. Discretion of Ct to permit public officials with law enforcement responsibilities to be present during examination and to permit access to transcript

F. Conflicts caused by multiple representation of witness by Atty

G. John Doe Judge rendering judicial decision must create record for possible review

CR 49: INQUESTS

1. Purpose and Venue

A. To inquire how a person died

B. Called when DA has reason to believe a death was caused under circumstances indicating

C. May be in any Cty where a trial may be held if criminal charges

2. Who May Order

A. DA

B. Circuit Ct Judge

C. Request of coroner or medical examiner made via DA

3. Hearing Procedure

A. Conducted by Judge or Circuit Ct Comm'r (CCC)

B. DA must appear and represent the State and present all evidence relevant and material to the inquiry

C. Conducted in front of a jury unless otherwise requested by DA or coroner or medical examiner

D. Jury shall consist of six (6) jurors

E. Jurors should be summoned in same manner as set out in §§ 756.04, 756.05

F. Ct may give appropriate preliminary instructions

G. DA may make statements to jurors at any time during the proceedings on evidentiary or procedural matters

H. Court may order proceeding to be secret on own or at DA's request

I. Burden of Proof

4. Juror Selection

A. Judge or CCC shall conduct the voir dire (See CR 23, Sec. 4, this volume)

B. Prospective juror may be excused for cause (See CR 23, Sec. 6, this volume)

C. DA may also question potential jurors

D. Alternate jurors may be selected if deemed necessary

E. Jurors sworn via oath or affirmation in § 979.05(4)

F. Jurors to be compensated as under § 756.25

5. Inquest Witnesses

A. To be subpoenaed by Ct at request of DA or coroner or medical examiner

B. Witnesses may have counsel present, however

C. Witnesses shall be sworn by oath set out in § 979.06(4)

D. Testimony must be reduced to writing or recorded

E. Inquest witnesses to be reimbursed as any other witnesses

6. Compelled Testimony

A. Witnesses may assert the privilege against self-incrimination with the following results

B. Any immunity is subject to § 972.085 restrictions

C. See CR 26, this volume, for discussion of immunity

7. Jury Instructions

A. Prepared and submitted by DA

B. The final instructions shall be compiled by Ct

C. Instructions shall include those criminal offenses for which the Ct believes a reasonable jury might return a verdict

D. Written instructions to be sent in with the jury during deliberations

8. Verdict

A. Verdict form must allow consideration of either of following

B. Verdict shall be unanimous, in writing, and signed by all jurors

C. Effect of verdict

9. Confidentiality of Record

A. Record may remain secret unless ordered open by Ct upon petition of DA

CR 50: SEXUALLY VIOLENT PERSON COMMITMENT

1. General Provisions

A. Nature and Purpose

B. Definitions

C. Jurisdiction

2. Procedure

A. Petition—Civil Ct action

B. Venue

C. Ct's duty upon filing of petition

D. Def's Rights—Not necessarily same rights as those afforded criminal Def

E. Probable cause hearing

F. Discovery: § 980.036 governs discovery; Ch 804 does not apply

G. Trial

H. Unanimity requires only that jury find person has mental disorder. Jury need not agree on which mental disorder. It is Trial Ct's discretion whether to submit a general or special verdict

I. Commitment

J. Postcommitment requirements

3. Petition for Supervised Release

A. Time frame

B. Hearing

C. Municipal involvement

D. Supervised release

E. Revocation of supervised release

4. Petition for Discharge

A. Committed person may petition for discharge at any time

B. Ct shall deny the petition without a hearing unless the petition or the record contains facts from which Ct or jury would likely conclude that the person's condition has changed so that the person no longer meets the SVP criteria (1) since the most recent order denying the discharge on the merits; or (2) since the date of initial commitment if there has not been a previous hearing on the merits of discharge

C. Trial shall be held within 90 days after the determination that the petition is sufficient

D. Trial Procedure

5. Collateral Attack

A. State v Escalona-Naranjo, 185 Wis. 2d 168 (1994), governs collateral attack on underlying commitment

6. Notice Concerning Release or Discharge

A. DHS shall notify the following if a person released or discharged

B. Notice to be postmarked at least 7 days before release or discharge

CR 51: JUVENILE/ADULT MATTERS

1. Original Jurisdiction of Adult Court

A. "Adult," for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, means a person who has attained 17 years of age at the time of charge

B. Juv adjudicated delinquent and alleged to have committed offenses of battery by prisoner or assault by prisoner, while placed in a Juv correctional facility, a Juv detention facility or a secured RCCCY, or who has been adjudicated delinquent and is alleged to have committed battery to an aftercare agent

C. Juv alleged to have violated any criminal law if previously waived and convicted in any Adult Ct or previously waived and proceedings pending in any Adult Ct from any other Cty

D. Juv alleged to have violated any criminal law and Juv previously convicted in Adult Ct of offense over which Adult Cts have original jurisdiction or proceedings pending in Adult Ct for such an offense

E. Juv alleged to have attempted or committed 1st-degree intentional homicide, or alleged to have committed 2nd-degree intentional homicide or 1st-degree reckless homicide on or after 10th birthday

F. Juvs specified in Secs. B.–E. above are subject to provisions of Criminal Code, including criminal penalties, except

G. Determination of Adult Jurisdiction of a Juvenile

2. Jurisdiction by Waiver from Juvenile Court to Adult Court (See Juvenile Benchbook, JV 5, Sec. 3)

A. Juv age 14 or over alleged to have done any of the following

B. Juv age 14 or over alleged to have committed, at the request of or for the benefit of a gang [§ 939.22(9)], a violation that would be felony under Ch 961 or Chs 939–948

C. Juv age 15 or over alleged to have violated any State criminal law

D. Juv of any age who absconds and returns as an adult may be waived

E. Juv Ct may not reconsider its waiver order after criminal complaint filed unless Adult Ct first transfers case

F. State may not intentionally delay charge until after Juv "ages up" (i.e., becomes old enough to be subject to Adult Ct jurisdiction) to manipulate system and avoid Juv Ct jurisdiction

G. Adult Ct must remand all counts of waived case to Juv Ct if Juv Ct lacked competency to waive any count

3. Adult Court Options for Sentencing Under Juvenile Justice Code

A. If Criminal Ct does not reverse waive Juv, but Juv found to have committed lesser or joined offense (but not offense giving Criminal Ct original jurisdiction to which it was joined), Criminal Ct shall find Juv delinquent and impose Juv disposition if any of following apply

4. Expunction

A. 17-year-old's right to request expunction of delinquency adjudications applies to adjudications under § 48.12, 1993 Stats., or § 938.12

B. Application for expunction of delinquency adjudication should be made to Juv Ct

C. Adult Ct may order expunction of criminal record of individual convicted of offense committed when individual was under 25 years old if

TR 1: PRETRIAL PROCEEDINGS

1. Jurisdiction

A. Subject-matter jurisdiction

B. Personal jurisdiction

2. Venue

A. In Cty where violation committed

B. Where two or more acts required for violation, in any Cty where any such act occurred

C. If act committed within 1/4 mile of Cty line, in either Cty

D. Entire width of boundary/highway intersection may be enforced by a peace officer from either jurisdiction

E. If offense committed “in, on or against any vehicle passing through or within” Wis, and it cannot readily be determined in which Cty venue lies

F. If act causing death in one Cty and death ensues in another, in either Cty

G. Any other basis for venue in a criminal case applies

H. For civil violations

3. Criminal Traffic Violations

A. Offenses under Traffic Code that are punishable by fine or imprisonment are crimes and entitle Def to

4. Initial Appearance—Defendant Appears

A. Def to be informed of rights

B. Entry of plea

5. Initial Appearance—Defendant Does Not Appear

A. Forfeiture actions

B. Criminal actions

6. Juveniles in Traffic Court

A. For 16 year olds, Traffic Ct (Circuit or Municipal) has exclusive jurisdiction over traffic, boating, snowmobile, ATV, utility terrain vehicle, and limited use off-highway motorcycle violations except

B. Persons under the age of 18 must be present for sentencing in traffic cases except

C. Juv convicted of traffic, boating, snowmobile, ATV, utility terrain vehicle, or limited use off-highway motorcycle offense treated as adult for sentencing purposes, except

7. Substitution of Judge

A. Substitution in civil forfeiture cases

B. Substitution in criminal cases

8. Discovery Motions

A. Civil forfeiture cases

B. Discovery limited in refusal hearings. Neither party entitled to discovery, except, if cause shown, Ct may allow Def to inspect documents and test devices

C. Criminal cases—see CR 10, Discovery and Inspection

9. Operating a Motor Vehicle While Intoxicated

A. Operating while under the influence of an intoxicant, controlled substance, controlled substance analog, or any combination of intoxicant, controlled substance, or controlled substance analog, or any other drug that renders person incapable of safely driving (OWI)

B. Operating with detectable amount of restricted controlled substance in his/her blood (RCS)

C. Operating with a prohibited alcohol concentration (PAC)

D. Person may be charged with any combination of the above charges arising out of the same incident. If found guilty of any combination of above charges, there is a single conviction for purposes of sentencing

E. Counting Offenses

F. Minor passenger—If there is a minor passenger under 16 years of age in the motor vehicle at the time of the violation, the applicable minimum and maximum fines and imprisonment are doubled

10. Motions: In General

A. Motion to dismiss for failure to state probable cause in complaint

B. Motion by prosecutor to dismiss or amend

C. Motion to dismiss for lack of reasonable suspicion for stop or probable cause to arrest

D. Probable cause determination at earlier refusal hearing does not preclude Def from raising same issue on main charge

E. Summary judgment not available to either party in civil forfeiture action

F. For challenges based on double jeopardy, see CR 15, Sec. 5, this volume

11. Motions Challenging Elements of "Operation," "Operating on Premises Held out to the Public," and "Motor Vehicle"

A. Operation

B. Premises held out to the public

C. Definition of motor vehicle—a "motor bicycle" is a "motor vehicle" when it is being self-propelled by the motor rather than by pedaling

D. A riding lawn mower is a motor vehicle

12. Suppression Motions

A. Motion to suppress field sobriety tests

B. Motions requesting suppression of chemical test results or challenging statutory automatic admissibility of test results

C. Motions to suppress evidence of refusal to take chemical test

D. Motion to suppress statements (criminal traffic case)

13. Motions: Relating to "Informing the Accused" Form

A. Failure to advise Def as required by § 343.305

B. Informing the Accused form accurately states that refusal to perform testing can be used against driver in Ct; form does not render consent involuntary

C. No right to Atty when deciding whether to take test and no right to be informed of lack of right to Atty

14. Implied Consent and Refusals

A. Officer may request operator to provide one or more samples of breath, blood, or urine if:

B. If refusal, Def may request hearing in writing and within 10 days after issuance of "Notice of Intent to Revoke"

C. If Def requests hearing within 10 days

D. Municipal Cts have authority to conduct refusal hearings if arrest was for violation of municipal ordinance and municipality has a Municipal Ct

E. If Def does NOT request hearing, or if all issues determined adversely to Def

15. Administrative Suspension

A. Prohibited PAC varies with number of priors

B. If Def submits to chemical test that shows PAC, officer must

C. If Def operating CMV submits to chemical test and result indicates any measured alcohol above 0.0%, officer must

D. Def administratively suspended for 6 months based on test result of above PAC or detectable amount of restricted controlled substance in blood

E. Def may seek DOT review of administrative suspension

F. If Def aggrieved by determination of hearing examiner, may request review by Ct hearing underlying charge

G. If Def aggrieved by order of Municipal Ct, may appeal to Circuit Ct for Cty where offense occurred

H. If Def aggrieved by order of Circuit Ct, may appeal to Ct of Appeals

I. Any period of suspension or revocation as a result of conviction for OWI/RCS/PAC charges is reduced by any period of administrative suspension, if both arise from same incident, but this calculation is performed by DOT

J. Treat request for judicial review as request for trial ASAP

16. Commercial Motor Vehicle Law

A. Commercial Driver's License (CDL) required to operate Commercial Motor Vehicle (CMV) on highway, except

B. Operators of CMVs exempt from CDLs still subject to alcohol prohibitions that apply to operators of CMVs (See Alcohol CMV Offenses in Sec. K below)

C. CMV is any motor vehicle designed or used to transport passengers or property that has one or more of following characteristics

D. Three separate classes of CDLs

E. Operating CMV without CDL is crime punishable by

F. Duties of CMV operators

G. Employers of CMV operators may not knowingly permit employee to operate CMV if employee

H. No employer may allow an employee to operate CMV in violation of

I. Employers of CMV operators must fire, or change job duties of, employee convicted of operating CMV while under influence of intoxicant

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6. Municipal Court Appeals

A. Litigants in Municipal Ct have right to appeal from

B. No appeal may be taken from a default judgment

C. Appellant must give Municipal Ct and other party notice of appeal and pay required fees within 20 days after judgment or decision

D. On perfection of appeal under § 800.14(2m), judgment or enforcement of Municipal Ct order stayed until final disposition of appeal unless otherwise ordered by Municipal Ct before transmittal or by Circuit Ct after transmittal

E. If trial was held, appeal from judgment shall be based on the record unless either party requests a new trial within 20 days after notice of appeal filed

F. If trial was not held, or if no request for new trial, appeal shall be based on review of the proceedings in Municipal Ct

G. If request for new trial, Municipal Ct shall transmit as much of record as deemed appropriate, but must include a copy of the citation or complaint and the judgment

H. If testimony was recorded in Municipal Ct, Circuit Ct may order preparation of written transcript of proceedings by any qualified Ct reporter at the cost of the appellant

I. Def claiming inability to pay appeal, jury, or transcript fee may petition the Circuit Ct for a waiver

J. Circuit Ct must certify disposition of appeal to Municipal Ct within 30 days after Circuit Ct judgment

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B. Suspension of DL

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3. Operating Without a Valid License (OWL)

A. No person may operate a motor vehicle upon a highway unless the person has a license that is not revoked, suspended, cancelled, or expired. This includes mopeds and motor bicycles but does not include limited use off-highway motorcycles

B. Penalties

4. Operating While Suspended (OWS)

A. No person whose operating privilege has been suspended may operate a motor vehicle upon any highway during the period of suspension or in violation of any restriction on an occupational license issued to the person during the period of suspension. A person’s knowledge that his or her operating privilege is suspended is not an element of the offense. Notwithstanding any specified term of suspension, the period of any suspension continues until the license is reinstated

B. Penalties

5. Operating After Revocation (OAR)

A. No person whose operating privilege has been revoked may operate a motor vehicle upon any highway during the period of revocation or in violation of any restriction on an occupational license issued to the person during the period of revocation. A person’s knowledge that his or her operating privilege is revoked is not an element of the offense. Notwithstanding any specified term of revocation, the period of revocation continues until the license is reinstated

B. Penalties

6. Criminal—Habitual Traffic Offender (HTO)

A. In addition to regular applicable penalties for OAR, if Def revoked as HTO, penalties enhanced by fine not to exceed $5,000 and imprisonment not to exceed 180 days

B. Before trial on any charge of OAR/OWS, or no DL, Ct must hold hearing to determine whether Def is HTO

C. Def will be revoked by DOT for 5 years as HTO if

D. Def may challenge HTO revocation by filing petition with Circuit Ct in Cty of residence. Petition to be filed in Dane Cty if Def not Wis resident

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Volume IA
Criminal and Traffic

Seventh Edition

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Benchbook: Master Index

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B. Marshal arguments

C. Focus issues for jury

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B. Opposing party responds and argues

C. Rebuttal allowed to party with burden

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(1970)

1) Attys should be allowed considerable latitude

St v Draize
88 Wis. 2d 445 (1979)
St v Bergenthal
47 Wis. 2d 668, 681
(1970)

2) Ct has discretion to determine propriety of argument

§ 972.11(1), § 805.10

3) Ct may limit time for argument

B. Guidelines for determining propriety of argument

St v Draize
88 Wis. 2d 445 (1979)

1) Attys may comment on evidence, including

St v Cameron
2016 WI App 54, ¶ 19
370 Wis. 2d 661

a. Arguing evidence to conclusion or inference

b. Arguing that evidence convinces Atty and should so convince jury

St v Bergenthal
47 Wis. 2d 668, 682
(1970)
Embry v St
46 Wis. 2d 151, 160
(1970)

- Atty must make clear opinion based solely on evidence in case

Embry v St
46 Wis. 2d 151, 160–61
(1970)

- Atty may not convey idea that Atty has undisclosed information

— Will lead jury to speculate on what was not adduced as evidence at trial

St v Cameron
2016 WI App 54, ¶ 19
370 Wis. 2d 661

- DA may not vouch for witness or otherwise express personal belief or opinion regarding truth or falsity of any testimony or evidence, or on guilt of Def, unless based on the evidence

St v Weiss
2008 WI App 72
312 Wis. 2d 382

- Improper to ask jury to draw inference DA knows or should know is untrue

St v McGee
52 Wis. 2d 736, 749
(1971)

2) Atty's comments on evidence limited to evidence in case

St v Jorgensen
2008 WI 60
310 Wis. 2d 138

a. Atty may not comment on facts outside record peculiarly within Atty's knowledge

St v Pulizzano
155 Wis. 2d 633 (1990)

- Arguments based on syndromes known to DA, but not commonly known, inappropriate unless supported by expert testimony

St v Johnson
153 Wis. 2d 121 (1990)

b. Unflattering characterizations of Def permitted if such descriptions supported by evidence

St v Hagen
181 Wis. 2d 934
(Ct. App. 1994)

c. Unflattering characterization of opposing counsel is improper

St v Neuser
191 Wis. 2d 131
(Ct. App. 1995)
St v Loomer
153 Wis. 2d 645
(Ct. App. 1989)

3) Attys may discuss legal principles presented in instructions of Ct

a. Improper for counsel to make inaccurate statement of the law

b. Improper for counsel to speak for Trial Ct, e.g., as to why Ct gave or refused to give lesser included instruction

St v Phillips
99 Wis. 2d 46, 52
(Ct. App. 1980)

4) Prosecution should generally avoid comment on Def's silence

St v Edwardsen
146 Wis. 2d 198, 213
(Ct. App. 1988)

a. Rule not absolute

US v Robinson
108 S. Ct. 864, 869 (1988)
Griffin v California
85 S. Ct. 1229 (1965)
St v Hoyle
2023 WI 24, ¶ 29
406 Wis. 2d 373

b. Three elements must be present for prosecution to improperly comment on Def's silence

- Language "manifestly intended to be," or "of such character that the jury would naturally and necessarily take it to be," a comment on Def's failure to testify
- Comment on Def's silence is evidence of guilt
- Comment not "a fair response to a claim made by" Def or Def's counsel

St v Edwardsen
146 Wis. 2d 198
(Ct. App. 1988)

c. When defense counsel focuses attention on Def's silence, DA may reflect on Def's silence and not violate constitutional rules

St v Hoyle
2023 WI 24
406 Wis. 2d 373

d. DA may comment on a victim's testimony as being "uncontroverted" by the evidence at trial

St v Phillips
99 Wis. 2d 46, 52

(Ct. App. 1980)

e. Statement should be viewed in context of entire record

St v Johnson
121 Wis. 2d 237
(Ct. App. 1984)

f. When Def makes closing argument, but has not testified, State may comment on difference between argument and evidence

St v Brecht
143 Wis. 2d 297 (1988)
St v Adams
221 Wis. 2d 1
(Ct. App. 1998)

g. Pre-arrest, pre-*Miranda* silence

- State may comment on Def's pre-*Miranda* silence only if Def not being investigated for specific crime, no arrest made, and reasonable person would not conclude that contact was coercive or that Def's freedom of action was being limited

St v Sorenson
143 Wis. 2d 226 (1988)

h. Post-arrest, pre-*Miranda* silence

- If Def testifies, State may comment on post-arrest, pre-*Miranda* silence

St v Brecht
143 Wis. 2d 297 (1988)
St v Fencl
109 Wis. 2d 224 (1982)

- If Def does not testify, State may not comment either on Def's post-arrest silence, or on Def's pre-arrest silence if contacts were coercive, Def was being investigated for specific crime and Def's freedom of action was limited

St v Robinson
140 Wis. 2d 673
(Ct. App. 1987)

i. Post-arrest, post-*Miranda* silence

- Def has due-process right not to have post-*Miranda* silence commented upon

St v Wulff
200 Wis. 2d 318
(Ct. App. 1996)
rev'd on other grounds
207 Wis. 2d 143 (1997)

- When Def chooses to give police a version of events post-*Miranda*, and leaves out significant facts, this evidence can be used to impeach Def's credibility without running afoul of due process and 5th Amendment rights

St v Wolff
171 Wis. 2d 161
(Ct. App. 1992)

5) Improper for a prosecutor to refer to possible penalties in closing argument

6) Cts have developed "invited reply" or "measured response" rule to apply to prosecutor's remarks to determine whether they are reasonable response to defense counsel's attacks

St v Smith
2003 WI App 234
268 Wis. 2d 138

7) Conviction will not be lightly overturned on basis of prosecutor's comments standing alone, but must be viewed in context of total trial

US v Solivan
937 F2d 1146
(6th Cir 1991)

8) Attys should not make closing arguments calculated to incite passions and prejudices of jurors or appeal to jury to act as conscience of community

St v Banks
2010 WI App 107, ¶ 24
328 Wis. 2d 766

9) Due-process violation for a prosecutor to comment on a Def's failure to consent to a warrantless search

St v Burns
2011 WI 22, ¶ 49
332 Wis. 2d 730

10) Test for whether a prosecutor's statements necessitate a new trial in the interest of justice is whether the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process"

St v Holt
128 Wis. 2d 110
(Ct. App. 1985)

4. Improper Argument

A. Objection must be made promptly

St v Guzman
2001 WI App 54
241 Wis. 2d 310
St v Seeley
212 Wis. 2d 75
(Ct. App. 1997)

B. Failure to object and move for mistrial waives right to object on appeal

St v Hagen
181 Wis. 2d 934
(Ct. App. 1994)

C. Ct must give curative instruction

St v Davidson
2000 WI 91
236 Wis. 2d 537

D. Def must move for mistrial to preserve objection to improper argument

St v Kelly
148 Wis. 2d 774
(Ct. App. 1989)

E. Error not preserved unless record of improper remarks

1) Sufficient record can be made

a. By transcript of arguments

b. By stipulation of counsel

c. By Ct reconstructing statements to which objection made on record later

St v Bjerkaas
163 Wis. 2d 949
(Ct. App. 1991)

F. Defense may not urge jury nullification

CR 30: JURY INSTRUCTIONS

1. General Principles Governing Giving of Instructions

St v Trammell
2019 WI 59, ¶ 23
387 Wis. 2d 156
St v Waites
158 Wis. 2d 376 (1990)

A. Ct has wide discretion as to instructions and the authority to modify the language of pattern instructions

St v McAdory
2021 WI App 89, ¶ 49
400 Wis. 2d 215

However, use caution when modifying pattern instructions because of painstaking effort to accurately state law and provide uniformity

B. Purpose of jury instructions

St v Neumann
2013 WI 58, ¶ 89
348 Wis. 2d 455
St v Bryzek
2016 WI App 48, ¶ 8
370 Wis. 2d 237

1) Fully and fairly inform jury of rules of law applicable to case

2) Assist jury in making reasonable analysis of evidence

St v Dyleski
154 Wis. 2d 306
(Ct. App. 1990)

C. Ct need only give instructions evidence reasonably requires

St v Herriges
155 Wis. 2d 297
(Ct. App. 1990)

1) If instructions adequately explain law applicable to facts, not error to refuse to use specific language requested by Def

St v Villarreal
153 Wis. 2d 323
(Ct. App. 1989)

2) Recommendations of Criminal Jury Instruction Committee persuasive, not binding, authority

St v Kramar
149 Wis. 2d 767 (1989)

3) Error to instruct on issue evidence does not support

4) Error to refuse to instruct on issue raised by evidence

St v Seymour
183 Wis. 2d 683 (1994)

5) Error to instruct in disjunctive if alternative acts each constitute a separate offense

Deprives Def of unanimous verdict

St v Trammell
2019 WI 59, ¶ 49
387 Wis. 2d 156

6) "Search for the truth" language in Wis JI-Cr 140 reasonable-doubt instruction does not unconstitutionally lower prosecution's burden of proof below reasonable-doubt standard

§ 972.10(5)

D. Ct must send complete set of written instructions on burden of proof and substantive law to be applied in case to jury room

Recommendation

Provide all final instructions in writing to jury

St v Peterson
220 Wis. 2d 474
(Ct. App. 1998)

E. Def should be present, in open Ct, during the giving of jury instructions

Includes reinstruction and supplemental instructions after jury deliberations have commenced

2. Instructions Conference

A. Informal conference

§ 805.13(3)

1) In chambers or outside presence of jury

§ 805.13(3)

2) In presence of Attys and Def, unless Def waives presence

§ 805.13(3)

3) After close of evidence

St v Camacho
176 Wis. 2d 860 (1993)

B. Formal instructions hearing

1) On record

2) Outside presence of jury

3) Summarize and outline discussions at informal conference

§ 972.10(5)

4) Specific instructions must be requested in writing, signed by party or Atty, and filed with clerk unless Ct directs otherwise

§ 972.10(5)

5) Ct must advise parties as to instructions it intends to give and its reasons for giving them

§ 972.10(5)

6) Parties place objections to particular instructions on record

St v Koch
144 Wis. 2d 838 (1988)

a. Failure to object to instruction waives contention that it should not have been given or was erroneous

St v Schumacher
144 Wis. 2d 388 (1988)
St v Gomaz
141 Wis. 2d 302 (1987)

b. When timely objection not made, new trial can be ordered only if

- Real issue in controversy has not been fully tried, or
- Probable that justice has miscarried, or
- Omitted instruction goes directly to integrity of fact finding process

Recommendation

7) Determine exhibits to go to jury

See **Jury Management**, **CR 24**, for discussion

St v Kuntz
160 Wis. 2d 722 (1991)

C. Ct must inform counsel of changes made to instructions following jury instruction conference and before delivery to jury

St v Harvey
2022 WI App 60
405 Wis. 2d 332

Failure to do so subject to harmless-error analysis

3. Defense-Requested Instructions

St v Johnson
2021 WI 61, ¶ 17
397 Wis. 2d 633
St v Mendoza
80 Wis. 2d 122, 152–53
(1977)
Ross v St
61 Wis. 2d 160, 172–73
(1973)
St v Schuman
226 Wis. 2d 398
(Ct. App. 1999)

A. Evaluate instruction by viewing evidence in light most favorable to Def

St v Johnson
2020 WI App 50
393 Wis. 2d 688
aff'd in part, *rev'd in part*
2021 WI 61
397 Wis. 2d 633

1) Without weighing the evidence, Judge must examine whether there is enough evidence that a reasonable jury could find self-defense

St v Stietz
2017 WI 58, ¶¶ 16–17
375 Wis. 2d 572

2) To be entitled to self-defense instruction, Def must meet a low bar by producing only "some evidence" in support, even if that evidence is weak, insufficient, inconsistent, or slight

3) Evaluation determines whether requested instruction based on mere conjecture or reasonable construction of evidence

Mathews v US
108 SCt 883 (1988)

4) Defense-requested instruction supported by evidence should not be denied on grounds that instruction is inconsistent with Def's testimony, because Def may claim inconsistent defenses

B. Theory of defense

St v Coleman
206 Wis. 2d 199 (1996)
St v Gonzalez
2010 WI App 104, ¶ 17
328 Wis. 2d 182,
rev'd on other grounds,

2011 WI 63
335 Wis. 2d 270

1) Warranted when four criteria are present:

a. Defense relates to a legal theory of a defense, as opposed to an interpretation of evidence;

b. Request is timely made;

c. Defense is not adequately covered by other instructions; and

d. Defense is supported by sufficient evidence

St v Schuman
226 Wis. 2d 398
(Ct. App. 1999)

2) Judge not to weigh evidence; only slight evidence required to create a factual issue and put defense before the jury

3) Weak or doubtful evidence entitles Def to the instruction unless evidence is rebutted by prosecution to extent that no rational jury could entertain a reasonable doubt as to any element of the defense

4. Lesser Included Offenses

A. Statutory authority

§ 939.66(1)
Blockburger v US
52 S. Ct. 180 (1932)
St v Carrington
134 Wis. 2d 260
(1986)

1) A crime that does not require proof of any fact in addition to those that must be proved for crime charged ("elements only" test)

§ 939.66(2), (2m), (2r)

2) Crime that is a less serious offense than charged offense, as defined by statute (e.g., homicide, battery, operating a motor vehicle without owner's consent)

St v Davis
144 Wis. 2d 852 (1988)
St v Glenn
190 Wis. 2d 155
(Ct. App. 1994), *aff'd*,
199 Wis. 2d 575 (1996)

Crime less serious if maximum penalty less than that prescribed for greater offense

§ 939.66(3)

3) Crime that is same as one charged except requires recklessness or negligence instead of criminal intent

§ 939.66(4)

4) Attempt to commit crime charged

5) A crime specified by § 939.66

§ 939.66(4m)

a. Crime of failure to timely pay child support under § 948.22(3) when crime charged is failure to pay child support for more than 120 days under § 948.22(2)

§ 939.66(5)

b. Crime of attempted battery when crime charged is sexual assault, sexual assault of a child, robbery, mayhem or aggravated battery, or attempt to commit any of them

§ 939.66(6)

c. Crime specified in § 940.285(2)(b)4. or 5. (subjecting "individual at risk" to abuse) when crime charged is specified in § 940.19(2)–(6) (battery), § 940.225(1), (2) or (3) (first-, second-, or third-degree sexual assault), or § 940.30 (false imprisonment)

§ 939.66(6c)

d. Crime that is a less serious type of violation under § 940.285 (abuse of individual at risk) than the one charged.

§ 939.66(6e)

e. Crime that is less serious type of violation under § 940.295 (abuse and neglect of patients and residents) than violation charged

§ 939.66(7)

f. Crime specified in § 940.11(2) (hiding corpse) when crime charged is specified in § 940.11(1) (mutilating corpse)

St v Jones
228 Wis. 2d 593
(Ct. App. 1999)
St v Martin
156 Wis. 2d 399
(Ct. App. 1990)

B. Test for submission of lesser included offense

St v Muentner
138 Wis. 2d 374 (1987)

1) First determine whether the crime is a lesser included offense of the charged crime

St v Johnson
2021 WI 61
397 Wis. 2d 633

2) Next, viewing in light most favorable to defense, the Ct must weigh whether there is some evidence from which a reasonable jury could acquit on the greater offense and convict on the lesser offense

St v Sarabia
118 Wis. 2d 655 (1984)

3) Not near-automatic inclusion of all lesser included offenses

St v Sarabia
118 Wis. 2d 655 (1984)

4) When Def presents wholly exculpatory evidence and requests lesser included offense instruction, Ct must reject wholly exculpatory testimony and apply tests to remaining evidence

Clark v St
62 Wis. 2d 194 (1974)

C. Instruction on lesser but not included offense improper

1) Deprives Def of right of notice

2) Violates procedural due process

D. Who may request lesser included offenses

St v Fleming
181 Wis. 2d 546
(Ct. App. 1993)

1) State

2) Def

3) Ct, on own motion

St v Myers
158 Wis. 2d 356 (1990)

a. Ct need not instruct on lesser included unless one party requests it

b. Evidence under reasonable view favorable to Def sufficient to establish guilt of lower degree with reasonable doubt as to higher degree

c. Not error not to instruct on lesser included sua sponte

Wis JI-Cr 112

E. Instructing jury on lesser included offense

1) Jury to first consider charged offense in complaint or information

St v Bergenthal
47 Wis. 2d 668 (1970)

2) Jury not to be given option to pick and choose least offense of which accused might be found guilty

3) Jury considers lesser included offense only if concludes that further deliberations will not result in unanimous agreement on charged offense

St v Truax
151 Wis. 2d 354
(Ct. App. 1989)

4) Failure to give lesser included offense instruction when warranted generally requires reversal

5. Instructions re: Presumptions

St v Kuntz
160 Wis. 2d 722 (1991)

A. Mandatory presumptions

1) Those which instruct jury it must find an element if State proves certain predicate facts

2) Relieves State of burden of proving element, if predicate facts established

Carella v California
109 SCt 2419 (1989)

3) Impermissible

a. Overrides presumption of innocence

b. Invades fact-finding function assigned exclusively to jury

St v Childs
146 Wis. 2d 116
(Ct. App. 1988)

B. Ct may give ordinary and common meaning of undefined term in statute

Jury then determines whether conduct fits definition given

St v Schleusner
154 Wis. 2d 821
(Ct. App. 1990)

C. Permissive inferences

1) Allows, but does not require, trier of fact to find element of crime from proof of another fact

a. Permitted inference must be rationally connected to proven fact and be more likely than not to flow from proven fact

b. Underlying facts must be proved beyond a reasonable doubt

2) Jury must be instructed to independently assess evidence

§ 939.05(1), (2)

6. Party to Crime Instruction

Harrison v St
78 Wis. 2d 189 (1977)

A. Ct may instruct as to commission of crime by principal, aider and abettor, and conspirator

Holland v St
91 Wis. 2d 134 (1979)

1) Such instruction not violative of constitutional right to unanimous verdict

May v St
97 Wis. 2d 175 (1980)
St v Thomas
161 Wis. 2d 616
(Ct. App. 1991)

2) No requirement, constitutional or otherwise, that jury must unanimously agree as to alternate ways crime can be committed

St v Oimen
184 Wis. 2d 423 (1994)

3) In felony murder situation, if party to a crime instruction given for underlying offense, it is redundant to repeat it for the homicide

7. *Falsus in Uno*

St v Long
2002 WI App 114
255 Wis. 2d 729
St v Lagar
190 Wis. 2d 423
(Ct. App. 1994)
Wis JI-Cr 305

A. Instruction has generally fallen into disfavor

1) Mere discrepancies likely attributable to defects of memory or mistakes not grounds for *falsus in uno*

2) To be given only if Trial Judge finds something in record that reasonably tends to show witness willfully swore falsely

Could be appearance, demeanor, contradictions between witnesses, inherent incredibility

8. Venue

St v Schultz
2010 WI App 124
329 Wis. 2d 424

If venue disputed, Ct must give jury instruction

9. Multiple Counts

A. When facts do not overlap

Peters v St
70 Wis. 2d 22 (1975)
US v Pacente
503 F2d 543
(7th Cir 1974)

Cautionary instruction required that advises that jury cannot use evidence relating to one charge in finding Def guilty of another charge

Wis JI-Cr 484

B. When facts do overlap

1) Cautionary instruction not required

2) Instruction requires that

a. Each count charges separate offense

b. Each count must be considered separately

c. Question of Def's guilt or innocence on one count may not affect verdict on other counts

10. Instructions Following Final Argument

A. Corrective instructions

St v Asfoor
75 Wis. 2d 411, 432
(1977)

1) Permitted in discretion of Ct, provided

a. Counsel has argued contrary to instructions previously given, and

St v Asfoor
75 Wis. 2d 411, 432
(1977)
US v Clarke
468 F2d 890 892
(5th Cir 1972)

b. Necessary to prevent jury from being misled by closing argument of counsel

11. Instructions After Commencement of Jury Deliberations

St v Hubbard
2008 WI 92
313 Wis. 2d 1
St v Gordon
2002 WI App 53,
250 Wis. 2d 702
rev'd on other grounds
2003 WI 69
262 Wis. 2d 380
St v Grady
175 Wis. 2d 553
(Ct. App. 1993)

A. Supplemental instruction on definitions of words permitted if

1) In conformity with common, approved usage, and

2) Correctly states the law, and

3) Supported by facts properly before jury

Wis JI-Cr 520

B. Supplemental instructions on jury agreement

Quarles v St
70 Wis. 2d 87, 90 (1975)

(Use of term "*Allen* charge" disapproved)

1) Used when jury unable to reach verdict

2) Purpose limited

a. Instruction urges "honest and sincere attempt" to arrive at verdict

Mead v Richland Ctr
237 Wis. 537, 540–41
(1941)

b. Judge may not direct minority to try changing views to coincide with majority

3) Discretionary procedure

a. No time limit as to when instruction may be given

b. No requirement whether Ct must first be informed that jury deadlocked

Quarles v St
70 Wis. 2d 87, 90 (1975)

c. Sua sponte delivery of supplemental instruction not invasion of province of jury

Recommendation

d. Should be given only once

12. Discharge of Jury on Deadlock

§ 972.01

A. Ct has authority to discharge jury if unable to agree on verdict

Recommendation

B. Supplemental instruction on jury agreement (Wis JI-Cr 520) should be given before determining jury deadlock

CR 31: VERDICTS

1. Verdict Conference

A. Informal verdict conference

1) Conducted jointly with informal instruction conference

2) In chambers or outside presence of jury

3) In presence of Attys and Def, unless Def waives appearance

4) After close of evidence

§ 805.13
§ 972.10

B. Formal verdict hearing

1) Conducted jointly with formal instruction hearing

2) On record

3) Outside presence of jury

4) Summarize and outline discussions at informal verdict conference

5) Ct must rule as to form and substance of verdicts

a. Objections must be placed on record

Wis JI-Cr 480

2. Form of Verdict

A. General verdict is usual form

B. Special verdict

1) For property offenses (including welfare fraud) for which value determines class of penalty

2) When venue contested

St v Dombrowski
44 Wis. 2d 486 (1969)

a. Venue must be proved beyond a reasonable doubt, and

Wis JI-Cr 480

b. Separate jury instruction required

C. Lesser included offenses

Wis JI-Cr 112

1) Instruct jury how to consider verdicts when lesser included offense submitted

a. Jury first to consider charged offense in complaint or information

b. Jury to consider lesser included offense only if concludes that further deliberations will not result in unanimous agreement on charged offense

St v Norman
2003 WI 72, ¶¶ 59–64
262 Wis. 2d 506

D. Multiple modes of commission

1) Def's right to unanimous verdict is not violated every time verdict is based on statute with multiple modes of commission

2) In evaluating multiple modes of commission, Cts employ the "fundamental fairness and rationality" test

3) Trial Ct must determine legislative intent

a. Does statute create multiple offenses or single offense with multiple modes of commission?

b. Ct reviews

- Statute language
- Legislative history and context of law
- Nature of proscribed conduct

- Appropriateness of multiple punishment

3. Return of Verdict

St v Behnke
155 Wis. 2d 796 (1990)

A. Counsel must be present, because return of verdict is critical stage, unless Def knowingly and voluntarily waives right to counsel's presence

B. Establish identity of foreperson or presiding juror (if not already known)

1) Inquire of foreperson whether verdict reached

2) Direct foreperson to hand verdict to clerk or Bailiff for delivery to Judge

C. Examine verdict to see whether properly executed and in proper form

1) Facially inconsistent verdicts regarding different charges against Def or involving co-Defs okay

Harris v Rivera
102 SCt 460 (1981)

a. No constitutional requirement that verdicts be explained, provided

- Sufficient evidence supports each, and

- Verdicts are product of fair trial

St v Thomas
161 Wis. 2d 616
(Ct. App. 1991)

b. Fact that not guilty verdict inconsistent with another verdict finding Def guilty does not by itself permit reversal because verdicts may result from leniency, mistake, or compromise

St v Hughes
2001 WI App 239
248 Wis. 2d 133
St v Johnson
184 Wis. 2d 324
(Ct. App. 1994)

- Inconsistency in verdicts is not per se grounds for reversal

St v Norman
2003 WI 72
262 Wis. 2d 506
St v Thomas
161 Wis. 2d 616
(Ct. App. 1991)

2) Unanimity

a. All jurors must agree to verdict and be unanimous as to ultimate issue of Def's guilt or innocence

St v Johnson
2001 WI 52
243 Wis. 2d 365
St v Koeppen
2000 WI App 121
237 Wis. 2d 418

b. Unanimity not required re: alternative ways in which crime committed, EXCEPT

St v Seymour
183 Wis. 2d 683 (1994)

- Unanimity required when statute uses alternatives to define independent offenses

D. Verdict to be read aloud by Ct or clerk

E. Polling jury

St v Behnke
155 Wis. 2d 796 (1990)

1) Def has right to have jury polled in every case, unless right knowingly and voluntarily waived

St v Yang
201 Wis. 2d 725
(Ct. App. 1996)
St v Eckert
203 Wis. 2d 497
(Ct. App. 1996)
St v Jackson
188 Wis. 2d 537
(Ct. App. 1994)

a. Waiver by counsel satisfies *Behnke* requirement

b. Polling of jury is corollary right to right of unanimous verdict

St v Coulthard
171 Wis. 2d 573
(Ct. App. 1992)

c. Failure to poll can be remedied by reassembling the jury and polling them

Recommendation

d. Ask whether polling wanted in every case

St v Wojtalewicz
127 Wis. 2d 344
(Ct. App. 1985)

2) Inquire of each juror, individually, whether verdict read was, and is now, juror's verdict

St v Behnke
155 Wis. 2d 796 (1990)

a. Tests whether uncoerced unanimity of verdict exists

b. Each juror takes personal responsibility by stating publicly that juror agrees with announced verdict

St v Raye
2005 WI 68, ¶¶ 34, 35, 45, 281 Wis. 2d 339
US v Williams
819 F3d 1026, 1033–34 (7th Cir 2016)

3) If a juror disavows the verdict, discontinue the polling. Ct has options:

a. Return jury to the jury room for continued deliberations,

b. If juror's response is ambiguous, Ct may inquire of juror further, or

c. Declare a mistrial

4) If each juror confirms verdict, Ct finds verdict represents true verdict of jury

F. Thank jurors for their service

1) Advise jurors they are not obligated to discuss case or verdict with anyone

2) Discharge jury

G. Request motion for judgment on verdict by prevailing party

1) Rule on motion

a. With finality, or

b. Subject to further rulings warranted after full hearing on motion or other postconviction or posttrial motions

H. Enter judgment

1) If guilty

a. Enter judgment of conviction

b. Judgment subject to any additional rulings

- On opposition to motion for judgment on verdict, or
- On other postconviction motions

St v Goldstein
182 Wis. 2d 251
(Ct. App. 1994)

c. Verify prior offender status

2) If not guilty

a. Enter judgment of acquittal

b. Discharge Def from terms of bond

4. Jury Nullification

St v Thomas
161 Wis. 2d 616
(Ct. App. 1991)

A. Juries have inherent and fundamental power to return verdict of not guilty irrespective of evidence

1) Right implicit in 6th Amendment right to jury trial

Wis JI-Cr 705

2) Nullification right is referenced in pattern instructions to jury that it "should" find Def guilty if satisfied by evidence, but that jury "must" find Def not guilty if not so satisfied

St v Zdzieblowski
2014 WI App 130, ¶ 16
359 Wis. 2d 102
St v Bjerkaas
163 Wis. 2d 949, 960
(Ct. App. 1991)

B. Jury's nullification power "does not translate to a *right* to have a jury decide a case contrary to law or fact"

1) No right to instruction to jury on nullification

2) No right to make argument to jury urging nullification

CR 32: IMPEACHING JURY VERDICT

1. General Rules

§ 906.06(2)

A. Juror may not testify to matters affecting juror's mind, emotions, or mental processes influencing juror to assent or dissent to a verdict

Peña-Rodriguez
v Colorado
137 SCt 855 (2016)
St v Williquette
190 Wis. 2d 677 (1995)
St v Messelt
185 Wis. 2d 254 (1994)

1) Rule fosters public policies

a. Discourages harassment of jurors

Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)

b. Encourages free and open discussion among jurors

c. Reduces incentives for jury tampering

d. Promotes verdict finality

e. Maintains viability of jury as judicial decision-making body

B. Exceptions to general rule

§ 906.06(2)
St v Messelt
185 Wis. 2d 254 (1994)
St v Shillcutt
119 Wis. 2d 788 (1984)
Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750
St v Searcy
2006 WI App 8
288 Wis. 2d 804

1) Juror is competent to testify when extraneous prejudicial information is improperly brought to jury's attention (extraneous information test)

St v Poh
116 Wis. 2d 510 (1984)
St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

a. "Extraneous is both not of record and beyond juror's general knowledge and accumulated life experiences"

Castaneda v Pederson
185 Wis. 2d 199 (1994)

b. The level of "prejudice" under § 906.06(2) that would permit juror to testify so as to impeach a verdict is lower than that necessary to impeach verdict

Johnson v Agoncillo
183 Wis. 2d 143
(Ct. App. 1994)

c. "Outside influence" is one imposed on jury from outside by third party

St v Messelt
185 Wis. 2d 254 (1994)
Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)

- Juror's bias, prejudice or subjective mental state generally not considered extraneous information or "outside influence"

Comment

d. Based on above, not competent evidence if jurors misunderstood a verdict question, misunderstood the effect of jury's ruling, assented because of fatigue, or claim verdict was not their true belief

Peña-Rodriguez
v Colorado
137 SCt 855, 869 (2016)

e. Juror competent to testify if during deliberations a juror makes a statement exhibiting overt racial bias that tends to show that racial animus was a significant motivating factor in the juror's vote to convict

C. Prohibited inquiries

1) Jurors' misunderstanding or intentional misapplication of law

2) Misunderstanding of charge for which Def on trial

3) Coercion or pressure by other jurors

4) Upset or distraction of jurors

5) Verdict arrived at by compromise

Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750

6) Effect of extraneous information on jury deliberations

§ 906.06(2)
Warger v Shauers
135 SCt 521 (2014)

7) Juror cannot testify, as part of inquiry to determine whether another juror failed to reveal relevant information during jury selection, about statements made during deliberations

2. Evidentiary Hearing

A. Preliminary procedure

Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750
St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

1) Affidavit(s) admissible under § 906.06(2) must be filed to make preliminary showing of entitlement to hearing

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

a. To be admissible, proffered evidence must be competent under § 906.06(2)

2) If affidavits not admissible because not competent, deny motion

St v Eison
194 Wis. 2d 160 (1995)

B. If the affidavit of juror regarding extraneous evidence indicates both a § 906.06(2) exception and facts that would require a new trial

1) Ct must make clear findings on the record

C. Conducting hearing

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)
St v Searcy
2006 WI App 8
288 Wis. 2d 804

1) Issues at hearing which Ct should consider and make findings about are

a. Whether statement was in fact made

b. Specifically when it was made

c. Circumstances under which it was made

d. Who made it

e. Which, if any, jurors were present

f. Whether jurors not present were informed of statement

g. Other relevant facts about statement that will assist Trial Ct to assess prospect of unfair prejudice

St v Broomfield
223 Wis. 2d 465 (1999)
St v Searcy
2006 WI App 8
288 Wis. 2d 804

2) At conclusion of hearing, Ct must determine whether party seeking to impeach verdict has cleared three hurdles

Castaneda v Pederson
185 Wis. 2d 199 (1994)

a. Proffered evidence must be competent under § 906.06(2) (based on same standards as for preliminary showing)

St v Searcy
2006 WI App 8
288 Wis. 2d 804
St v Heitkemper
196 Wis. 2d 218
(Ct. App. 1995)

b. Proponent of juror's testimony has clear, satisfactory, and convincing burden

Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)

c. Evidence must show prejudice, which is determined by

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

- Nature of the matter

St v Faucher
227 Wis. 2d 700 (1999)

- If lack of juror candor is issue, either subjective or objective bias may suffice

Bittner v American
Honda Motor Co
181 Wis. 2d 93
(Ct. App. 1993)
rev'd on other grounds
194 Wis. 2d 122 (1995)

- If extraneous information is issue, objective bias is standard: probable effect on hypothetical average juror

St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

D. Only Judge can question juror, but Attys may submit written questions

3. Instances of Misconduct

St v Wyss
124 Wis. 2d 681 (1985)

A. False and misleading answers (lack of juror candor)

Johnson v Agoncillo
183 Wis. 2d 143
(Ct. App. 1994)
St v Olson
179 Wis. 2d 715
(Ct. App. 1993)

1) Test consists of two parts

St v Broomfield
223 Wis. 2d 465 (1999)
St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

a. Whether juror incorrectly or incompetently responded to material question on voir dire, and, if so

b. Whether it is more probable than not that under facts of case juror was biased against moving party (statutory bias, subjective bias, or objective bias)

2) Ct must consider following factors in reviewing both parts of *Wyss* test

a. Did question asked sufficiently inquire into subject matter to be disclosed by juror?

b. Were responses of other jurors to same question sufficient to put reasonable person on notice that answer was required?

c. Did juror become aware of the false or misleading answers at any time during trial and fail to notify Ct?

St v Faucher
227 Wis. 2d 700 (1999)
St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

3) Step two of *Wyss* test involves alleged partiality or bias of juror

a. Partiality may be statutory, subjective, or objective bias

b. Issue addressed to discretion of Ct

B. Specific instances of alleged juror misconduct by lack of juror candor

1) Juror referred to Def's race

St v Shillcutt
119 Wis. 2d 788 (1984)

a. Statement lacked sufficient factual content and so was not extraneous; thus, not admissible under § 906.06(2)

Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)
St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

b. The rule of testimonial incompetence of jurors must give way when shown that juror prejudice regarding race, national origin, religion, etc., is of such magnitude as to constitute an obvious default of justice or when fundamental fairness is violated

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

2) Juror referred to Atty's religion, Atty's defense of motorcycle gang, and Atty's involvement in suicide of a Judge

a. Case remanded to Trial Ct for hearing

C. Presentation and consideration of extraneous information

St v Faucher
227 Wis. 2d 700 (1999)

1) Extraneous information reaching jurors is not part of evidence and may undermine verdict

St v Broomfield
223 Wis. 2d 465 (1999)
St v Messelt
185 Wis. 2d 254 (1994)

2) Whether extraneous evidence prejudiced jury is question of law and considered only from an objective bias standard

D. Specific instances of alleged juror misconduct due to extraneous information

St v Poh
116 Wis. 2d 510 (1984)

1) Juror referred to "other acts" evidence (not of record) concerning Def's supposed history of drunk driving

a. New trial mandated

Castaneda v Pederson
185 Wis. 2d 199 (1994)

2) Juror researched range of awards in medical malpractice cases

a. Wis Supreme Ct held information was extraneous because not of record and not part of juror's general knowledge and was improperly brought to attention of jury

b. Based on totality of circumstances, Supreme Ct found information to be potentially prejudicial and, thus, a new trial was ordered on damages

Bittner v Amer Honda Motor Co 181 Wis. 2d 93 (Ct. App. 1993) *rev'd on other grounds* 194 Wis. 2d 122 (1995)

3) Juror took unauthorized view of accident scene and told other jurors that accident could not have happened without plaintiff's contributory negligence

a. In seven-week trial with many experts, this one remark said to have little weight on hypothetical average juror

St v Messelt 185 Wis. 2d 254 (1994) *But see St v Faucher* 227 Wis. 2d 700 (1999)

4) In sexual assault prosecution (*Messelt*), four jurors knew of Def's prior sex assault convictions, which were not admitted in evidence, or knew other allegedly extraneous matters. Wis Supreme Ct:

a. Ruled that § 906.06(2) does not prevent jurors from testifying for purposes of determining whether a juror failed to reveal potentially prejudicial information during voir dire

b. Reaffirmed two-step test of *St v Wyss* in situation in which juror failed to reveal information on voir dire

- That juror incorrectly or incompletely responded, and
- More probable than not that juror was biased against moving party

c. Interpreted § 906.06(2) not to require communication between jurors; i.e., the prejudice of only one juror is sufficient to invalidate verdict

After Hour Welding v Laneil Mgmt Co 108 Wis. 2d 734 (1982)

d. Confirmed three-step analysis of *After Hour Welding*

- Was evidence competent?
- By clear, satisfactory, and convincing evidence were statements made or did alleged misconduct occur?
- If yes, does information constitute prejudice requiring reversal based on an objective bias test only

St v Faucher 227 Wis. 2d 700 (1999)

Johnson v Agoncillo
183 Wis. 2d 143
(Ct. App. 1994)

5) In medical malpractice case, several jurors failed to respond during voir dire to inquiry regarding opinions about effect of medical malpractice awards on health-care costs, and another juror failed to reveal that juror's father was a physician. During deliberations, a nurse said she feared a finding of negligence would come back and haunt her

   a. Ct of Appeals affirmed Trial Ct's finding that juror affidavits of discussions during deliberations were not competent evidence

St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

6) Def's motion claimed one or more jurors, before deliberation, made a noose and stated Def "should hang"; one or more jurors indicated, before deliberation, that they would not listen to Def Atty because of his dialect (he was African-American); one or more jurors said, before deliberation, that they should walk out because trial was "useless" and Def was guilty

   a. Ct of Appeals found no basis for evidentiary hearing because Def did not make preliminary showing under § 906.06(2), since no affidavits were filed. Even if affidavits had been filed, allegations did not meet the "fundamental fairness offended" standard

St v Broomfield
223 Wis. 2d 465 (1999)
St v Faucher
227 Wis. 2d 700 (1999)

7) Extraneous information about prior hung jury on Def's case and prior alleged bad acts of Def was not sufficiently prejudicial to reverse verdict under objective bias criteria

Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750

8) Dictionary definition of "neglect" was extraneous information that probably would have the prejudicial effect of deflecting attention away from the jury instruction on negligence

CR 33: DEFENDANT PRESENCE/DISRUPTION

1. Presence of Defendant

§ 971.04(1)

A. Def must be present in Ct, either personally or by telephone or live audiovisual means

1) At arraignment (§ 971.04(1)(a))

St v Anderson
2017 WI App 17, ¶ 30
374 Wis. 2d 372
St v Soto
2012 WI 93
343 Wis. 2d 43
See CR 13, Sec. 1.A

2) At a plea hearing

§ 971.04(1)(b)
May v St
97 Wis. 2d 175 (1980)

3) At trial

§ 971.04(1)(c)
St v Tulley
2001 WI App 236
248 Wis. 2d 505
St v Harris
229 Wis. 2d 832
(Ct. App. 1999)
St v David JK
190 Wis. 2d 726
(Ct. App. 1994)

4) When jury being selected, including individualized voir dire

§ 971.04(1)(d)
St v Carter
2010 WI App 37
324 Wis. 2d 208

5) At any evidentiary hearing

§ 971.04(1)(e)

6) At jury view

St v Peterson
220 Wis. 2d 474
(Ct. App. 1998)
St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

7) During communication between Judge and jury

St v Alexander
2013 WI 70
349 Wis. 2d 327

a. Def need not be present in chambers for colloquy with individual juror about bias issue that arises after trial is underway; Ct should consider

- Whether absence of Def will thwart a "fair and just hearing"
- Whether Def can meaningfully participate
- Whether Def can gain anything by attending

- Whether presence of Def would be intimidating or otherwise counterproductive

§ 971.04(1)(f)

8) When jury returns verdict

§ 971.04(1)(g)
St v Koopmans
210 Wis. 2d 670 (1997)

9) At pronouncement of judgment and imposition of sentence

St v McReynolds
2022 WI App 25
402 Wis. 2d 175
pet for rev denied

Ct's statement of reasons for sentencing decision is distinct event and may be in writing per § 973.017(10m)

§ 971.04(1)(h)
St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

10) At any other proceeding when ordered by Ct, or when Def has personal knowledge relevant to subject at issue

St v Alexander
2013 WI 70
349 Wis. 2d 327

11) At chambers conferences, if Def's absence will thwart a fair and just trial

a. Consider factors listed under **Sec. 1.A.**7) above

St v Clifton
150 Wis. 2d 673, 685–86
(Ct. App. 1989)

b. Def need not be present for discussion solely of law or procedure

Recommendation

c. Def should be present at all times in chambers, unless presence waived by Def on record or unless security precautions suggest otherwise

Leroux v St
58 Wis. 2d 671 (1973)

12) Def not required to be present for pretrial hearing solely on legal or procedural questions

Sanders v St
69 Wis. 2d 242 (1975)
St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

13) Def need not be present for posttrial hearings unless evidentiary in nature and Def has personal knowledge relevant to issues to be decided

B. See Remote Proceedings, CR 4, for circumstances and requirements when Def may appear by telephone or live audiovisual means

§ 971.04(2)

C. Voluntary absences in misdemeanor proceeding only

1) Def must authorize own Atty to act on Def's behalf

2) Leave of Ct mandatory to accept authorization and to allow Def's absence

§ 971.04(2)

3) Statute authorizes Ct-accepted absence in all proceedings of a misdemeanor case

Recommendation

Despite statutory authorization, Ct should not approve of Def's absence from trial, sentencing, or testimonial hearing in a misdemeanor proceeding

4) There are no authorizations for absence of Defs in felony actions

D. Absence of Def at trial or sentencing

St v Washington
2018 WI 3, ¶¶ 32, 51
379 Wis. 2d 58

1) Def who refuses to cooperate with counsel or courtroom procedures may be held to have waived right to be present

St v Washington
2018 WI 3, ¶ 52
379 Wis. 2d 58

a. Ct may determine waiver based on Def's conduct, but "the best practice is to engage the defendant in a colloquy"

Recommendation

b. Observe procedures for removing disruptive Def in **Sec. 1.E.** below

2) If Def is entirely absent from trial, bench warrant should be issued and trial should not commence

St v Washington
2018 WI 3, ¶¶ 34, 35
379 Wis. 2d 58
St v Dwyer
181 Wis. 2d 826
(Ct. App. 1994)

3) If Def is present at the beginning of trial, and then absconds, trial can be completed as though Def were present

St v Miller
197 Wis. 2d 518
(Ct. App. 1995)

a. Beginning of jury trial requires that Def be present during voir dire and jurors being sworn

b. Beginning of Ct trial requires that Def be present when first witness has been sworn

St v Washington
2018 WI 3, ¶¶ 34, 35
379 Wis. 2d 58
St v Koopmans
210 Wis. 2d 670 (1997)

4) If Def has voluntarily absented self, sentencing should not proceed until Def is apprehended and returned to Ct

St v Divanovic
200 Wis. 2d 210
(Ct. App. 1996)

5) If Def is in custody and refuses to be brought to Ct, trial and sentencing may proceed and be completed, because Def has waived constitutional right to be present

Recommendation

Uncooperative Def in custody should be escorted involuntarily to court for trial and sentencing. If Def uncooperative in Ct, Def should be warned on the record by Ct, and if lack of cooperation continues, Def should be removed from Ct

E. Removal by Ct

Illinois v Allen
90 SCt 1057 (1970)
St v Vaughn
2012 WI App 129
344 Wis. 2d 764

1) Def whose conduct so disruptive that trial cannot proceed in orderly manner may be removed

ABA Stds—Special
Functions of Trial Judge
§ 6-3.8 (2000)

2) Procedure to be followed before removal

a. Admonish Def that continued disruption will result in removal

b. Make record of circumstances requiring removal

c. Give Def continuing opportunity to return upon good conduct

St v Haste
175 Wis. 2d 1
(Ct. App. 1993)

d. Counsel must continue to represent Def absent waiver

- *See* **Right to Counsel**, **CR 3**

3) Afford Def reasonable opportunities to confer with counsel during trial

4) Summon Def to courtroom at appropriate intervals with offer to permit Def to remain if behaves

F. Clothing of Def

Estelle v Williams
96 SCt 1691 (1976)
St v Clifton
150 Wis. 2d 673
(Ct. App. 1989)

5) Def's due-process rights violated when Def required to appear at trial in identifiable prison/jail clothing

2. Physical Restraints

St v Miller
2011 WI App 34, ¶ 4
331 Wis. 2d 732

A. Generally, Def should not be restrained during trial

ABA Stds—Special
Functions of Trial Judge
§ 6-3.8 (2000)

B. Removal from courtroom of disruptive Def preferable to gagging, handcuffing, and shackling—use all these procedures with great caution

St v Haste
175 Wis. 2d 1
(Ct. App. 1993)

"Haste makes waste"

Deck v Missouri
125 SCt 2007 (2005)
Sparkman v St
27 Wis. 2d 92 (1965)

C. Physical restraints may be warranted under unusual circumstances

St v Miller
2011 WI App 34, ¶ 5
331 Wis. 2d 732

1) To maintain order and decorum in courtroom

2) To prevent escape

3) To prevent Def from injuring self or others

St v Grinder
190 Wis. 2d 541 (1995)
St v Knighten
212 Wis. 2d 833
(Ct. App. 1997)
St v Clifton
150 Wis. 2d 673
(Ct. App. 1989)

4) Def's Atty and Def should be heard before order entered

St v Champlain
2008 WI App 5, ¶ 33
307 Wis. 2d 232

5) Determination of restraints in courtroom must be made by Judge, not police

St v Miller
2011 WI App 34, ¶ 11
331 Wis. 2d 732
St v Champlain
2008 WI App 5
307 Wis. 2d 232

6) Even if Def does not object, Ct has duty to determine necessity of restraint, if visible to jury

Harrell v Israel
672 F2d 632
(7th Cir 1982)

7) Shackling may adversely affect Def's credibility as a witness

D. Upon ordering Def restrained

St v Russ
2006 WI App 9
289 Wis. 2d 65
(Anderson, J, concurring)
St v Clifton
150 Wis. 2d 673
(Ct. App. 1989)

1) Exercise discretion, consider less restrictive alternatives, and state reasons for restraint on record

St v Knighten
212 Wis. 2d 833
(Ct. App. 1997)
St v Simplot
180 Wis. 2d 383
(Ct. App. 1993)

2) Attempt to hide restraints from jury's view if possible

Recommendation

Use "skirt" around counsel table

ABA Stds—Trial by Jury
§ 15-3.2(d) (1996)

3) At request of Def's Atty, give remedial instruction to jury to effect: "Such restraint is not to be considered in assessing proof and determining guilt"

US v Van Sach
458 F3d 694
(7th Cir 2006)

If Def is self-represented, give remedial instruction and ask during jury selection whether shackles will influence verdict

3. Uniformed Security Personnel

Holbrook v Flynn
106 SCt 1340 (1986)
St v Clifton
150 Wis. 2d 673
(Ct. App. 1989)

A. Use of uniformed security officers not inherently prejudicial

Recommendation

B. State basis on record for use of any unusual security precautions

CR 34: MENTAL DISEASE OR DEFECT

1. Pretrial Procedure

St v Kazee
192 Wis. 2d 213
(Ct. App. 1995)

A. Plea of not guilty by reason of mental disease or defect (NGI) usually made at time of initial appearance in misdemeanor or at arraignment in felony

1) Although no statutory provision sets date by which plea must be made, plea must be entered sufficiently in advance of trial to permit not only suitable notice to prosecutor but also adequate time for implementation of procedures mandated by statute

St v Oswald
2000 WI App 3
232 Wis. 2d 103

a. Ct may reject plea at later stage of proceedings upon balancing interests of Def with institutional need to resolve cases in a timely fashion

2) May be combined with plea of guilty or not guilty

St v Lagrone
2016 WI 26, ¶ 29
368 Wis. 2d 1

3) If NGI plea not accompanied with a not guilty plea, the Def admits the elements of the offense charged. The Ct will find the Def guilty and proceed to the NGI portion of the trial

§ 971.16(2)
RMC Form CR-270

B. Ct may appoint one to three physicians or psychologists, as the Ct's experts, to examine Def and testify at trial

St v Skamfer
176 Wis. 2d 304
(Ct. App. 1993)
St v Burdick
166 Wis. 2d 785
(Ct. App. 1992)

1) Ct to determine compensation

a. Cty to pay

§ 971.16(3)

2) Report must be submitted to Ct no later than 10 days before trial, or when ordered by Ct

a. Ct to distribute copies of report to Attys

St v Jacobson
164 Wis. 2d 685
(Ct. App. 1991)

- Def's 5th Amendment rights protected by fact that any inculpatory statements made during psychiatric exams inadmissible in guilt phase of trial

b. Contents confidential until physician or psychologist testifies or trial ends

3) Both State and Def may cross-examine

C. DAs or defense Attys may hire own psychiatrist or psychologist at own expense

§ 971.16(5)

D. Contents of report

1) Report must contain opinion on ability of Def to appreciate wrongfulness of conduct or conform conduct with requirements of law at time of offense

2) If sufficient information available to reach opinion, report to include opinion on whether Def needs medication or treatment and whether Def not competent to refuse medication or treatment

§ 971.16(3)

a. Def not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism, or drug dependence, and after advantages, disadvantages, and alternatives explained,

- Def is incapable of expressing understanding of advantages and disadvantages of accepting medication or treatment and alternatives, OR

- Def is substantially incapable of applying understanding of advantages, disadvantages, and alternatives to Def's condition in order to make informed choice as to whether to accept or refuse medication or treatment

KS v Winnebago Cty (In re Mental Cond of KS)
147 Wis. 2d 575
(Ct. App. 1988)

NOTE: Explanation of medically unaccepted and unrecognized alternatives not required

§ 971.16(4)

E. If DA or Def hires own expert, report must be furnished to opposing side not less than 15 days before trial

Enis v DHSS
962 FSupp 1192
(WD Wis 1996)

F. Orders for forced medications under § 971.17

1) Section 971.17 is unconstitutional to the extent that it does not require

a. Finding that inmate is dangerous in confinement

b. Psychotropic medications are in inmate's medical interest given legitimate needs of institutional confinement

c. Showing that less intrusive alternatives are not readily available

d. Periodic review of medication decision

- GAL not required

2. Trial Procedure

§ 971.165

A. Trial is bifurcated, with issues of guilt and responsibility addressed separately

1) First phase identical to ordinary criminal trial

a. Jury to be informed of Def's pleas and that verdict to be taken upon plea of not guilty before introduction of evidence on plea of NGI

Recommendation

b. Give Wis JI-Cr 601 at start of trial; Wis JI-Cr 602 at end of guilty phase of trial

§ 971.165(1)(c)

c. Same jury for both pleas except

- If one or more jurors of first phase become unable to serve, remaining jurors to determine second plea

St v Weber
174 Wis. 2d 98
(Ct. App. 1993)

- If judgment on 2nd plea reversed on appeal but 1st not, and case remanded, or Trial Ct vacates judgment as to 2nd plea but not 1st, 2nd plea may be determined by different jury

Steele v St
97 Wis. 2d 72, 97–98
(1980)

d. Experts may not testify, based on Def's mental health, on issue of Def's capacity to form intent in guilt phase of trial

Recommendation

e. If guilt established on first plea, Wis JI-Cr 603 should be given before evidence introduced on mental responsibility

§ 971.165(1)(a)
St v Locke

177 Wis. 2d 590
(Ct. App. 1993)

f. Error in guilt phase necessarily requires retrial of both phases

St v Lagrone
2016 WI 26, ¶ 53
368 Wis. 2d 1

g. If Def chooses to admit guilt, regular guilty plea procedure should be used for first phase

2) Second phase addresses mental disease or defect

St v Lagrone
2016 WI 26, ¶ 57
368 Wis. 2d 1

a. Although a better practice, Ct need not conduct a right-to-testify colloquy at the responsibility phase

§ 971.15(3)
St v Magett
2014 WI 67,¶ 38
355 Wis. 2d 617

b. Mental disease or defect excluding responsibility is affirmative defense, which Def must establish to reasonable certainty by greater weight of credible evidence

§ 971.15(2)

c. Terms *mental disease* or *mental defect* do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct

St v Magett
2014 WI 67,¶ 39
355 Wis. 2d 617
St v Leach
124 Wis. 2d 648, 663–64
(1985)

d. Ct may direct verdict against Def on issue of mental responsibility if Def fails to present sufficient evidence to create a jury question when evidence viewed in light most favorable to Def

St v Kucharski
2015 WI 64, ¶ 32
363 Wis. 2d 658
St v Magett
2014 WI 67, ¶¶ 41–44
355 Wis. 2d 617

e. Although an expert may be helpful, favorable expert testimony is not a prerequisite to finding a mental disease or defect

§ 971.165(2)

f. Ct must inform jury of effect of NGI verdict

- Def will be committed to custody of DHS and placed in appropriate institution unless Ct determines Def would not pose danger to self or others if released under Ct-imposed conditions- in lieu of criminal sentence or probation

§ 971.165(3)(a)

g. If Def NOT found NGI, Ct must enter judgment of conviction and impose or withhold sentence

§ 971.165(3)(b)

h. If Def found NGI, Ct must enter judgment of NGI and proceed under § 971.17 (see **Sec. 3** below)

- Judgment interlocutory to commitment order under § 971.17 and reviewable upon appeal from that order

§ 971.165(2)

- 5/6 verdict required

St v Koput
142 Wis. 2d 370 (1988)

i. If error in responsibility phase of bifurcated trial, only retrial of responsibility phase is appropriate

§ 971.16(5)

B. Trial testimony of examiner

1) May cover nature of examination

St v Lindh
161 Wis. 2d 324 (1991)

a. Constitutional privilege against self-incrimination does not require exclusion of results of psychiatric interview with Def from second phase of trial on grounds that psychiatrist did not comply with dictates of *Miranda*

§ 971.16(5)

2) May include diagnosis of mental condition of Def at time of commission of offense charged

3) May contain opinion as to ability of Def to appreciate wrongfulness of conduct or to conform to requirements of law

4) May contain opinion on whether Def needs medication or treatment and whether Def not competent to refuse medication or treatment

St v Weber
174 Wis. 2d 98
(Ct. App. 1993)

5) Evidence too highly prejudicial at guilt phase may be admissible at second phase, particularly if new jury

Enis v DHSS
962 FSupp 1192
(WD Wis 1996)

6) May contain opinion on whether Def needs medication or treatment and whether Def not competent to refuse medication or treatment

a. Testimony regarding Def's need for and competence to refuse medication or treatment may not be presented before jury determining Def's ability to appreciate wrongfulness of conduct

§ 971.16(2)

7) Cross-examination permitted. Both parties may cross-examine Ct's experts

St v Lindh
161 Wis. 2d 324 (1991)

a. Ct may limit cross-examination of expert to

- Issues that tend to make more or less likely the accuracy and correctness of diagnosis and professional opinion in case

- Expert's character for truthfulness and untruthfulness

b. Use of irrelevancies on cross-examination insinuating that witness is person of bad moral character not a proper impeachment device

RMC Form CR-271

3. Commitment If Defendant Found NGI

§ 971.17(2)

A. Ct must enter initial commitment order pursuant to hearing held as soon as practicable after judgment

1) If Ct unable to determine whether Def to be committed under institutional care or on conditional release immediately after trial, Ct may adjourn hearing and order DHS to conduct predisposition investigation using § 972.15 procedure, supplementary mental examination, or both

§ 971.17(2)(b)

a. If supplementary mental examination ordered, Ct may appoint one or more examiners having specialized knowledge determined by Ct to be appropriate to examine and report on condition of Def

b. In lieu of appointing examiner(s), Ct may commit Def to appropriate mental health facility for examination

§ 971.17(2)(c)

- Report filed within 15 days after examination ordered

- For good cause, Ct may allow one 15-day extension

§ 971.17(2)(b)

- Time spent in facility to be counted as days spent in custody under § 973.155

§ 971.17(2)(c)

c. Outpatient examination report must be filed within 15 days after examination ordered

§ 971.17(2)(e)

d. Examiner must personally observe and examine Def

e. Examiner must have access to Def's past or present treatment records and patient health-care records

f. If examiner believes Def appropriate for conditional release, examiner must report on type of treatment and services Def may need while in community on conditional release

§ 971.17(2)(f)

g. Costs of examination paid by Cty upon order of Ct as part of costs of action

§ 971.17(2)(g)

h. Within 10 days after examiner's report filed, Ct must hold hearing to determine whether commitment to be institutional care or conditional release

§ 971.17(3)(a)

B. Commitment order must specify institutional care or conditional release

1) Ct may consider, without limitation

a. Nature and circumstances of crime

b. Def's mental history and present mental condition

c. Where Def will live

d. How Def will support self

e. What arrangements available to ensure Def has access to and will take necessary medication

f. What arrangements possible for treatment beyond medication

St v Wilinski
2008 WI App 170, ¶ 10
314 Wis. 2d 643

2) Ct must order institutional care if finds by clear and convincing evidence that conditional release of Def would pose significant risk of bodily harm to self or others or of serious property damage

St v Brown
2010 WI App 113, ¶ 16
328 Wis. 2d 241

a. "Serious property damage" includes not only physical harm or destruction, but also loss of goods or money

b. If finding not made, Ct must order conditional release

§ 971.17(3)(b)

C. Ct must issue, as part of commitment order, order that Def not competent to refuse medication or treatment, IF

1) State proves by clear and convincing evidence that Def not competent to refuse medication or treatment

St v Wood
2010 WI 17, ¶¶ 34–38
323 Wis. 2d 321

2) Dangerousness finding is unnecessary; dangerousness finding is implicit in § 971.17(3)

D. Period of commitment

§ 971.17(1)
St v Fugere

2019 WI 33, ¶ 47
386 Wis. 2d 76

1) If Def found NGI for felony committed on or after July 30, 2002, Def committed to DHS for period not exceeding maximum term of initial confinement (not including extended supervision) that could be imposed, plus term of confinement authorized by any applicable penalty enhancement statutes

a. For Def found NGI for felony committed before July 30, 2002, apply formula for misdemeanors in para. 2) below

2) If Def found NGI for misdemeanor, Def committed to DHS for period not exceeding two-thirds maximum term of imprisonment that could be imposed, including periods authorized by any applicable penalty enhancement statutes

3) If maximum term is life, commitment period (for Def found NGI for felony) may be life subject to termination by petition

St v Yakich
2022 WI 8
400 Wis. 2d 549
St v CAJ
148 Wis. 2d 137
(Ct. App. 1988)

4) In multiple offense situations, maximum period of commitment is defined by consecutive maximum terms

4. Defendant Committed to Institutional Care

§ 971.17(3)(a)

A. Ct must commit Def to institutional care only if Ct finds by clear and convincing evidence that conditional release of Def would pose significant risk of bodily harm to Def or others or of serious property damage

§ 971.17(3)(c)
§ 51.37(3)

B. DHS must place Def in Winnebago or Mendota Mental Health Institutes

§ 51.37(4)

1) DHS, with approval of committing Ct and Cty Dept under § 51.42 or § 51.437 may transfer care and custody of Def to that Cty Dept

a. Transfer subject to § 51.35 (*See* **Probate, Guardianship and, Mental Health Benchbook, MH 3**)

§ 971.17(3)(c)
St v Wood
2010 WI 17
323 Wis. 2d 321

C. If Def not subject to Ct order finding Def not competent to refuse medication or treatment and if institution determines Def should be subject to such Ct order

1) Institution may file with Ct motion for hearing on whether Def not competent to refuse medication or treatment

a. Notice to Def, Def's Atty, and DA

§ 971.16(3)

2) Standard: Def not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism, or drug dependence, and after advantages, disadvantages, and alternatives explained,

a. Def is incapable of expressing understanding of advantages and disadvantages of accepting medication or treatment and alternatives, OR

b. Def is substantially incapable of applying understanding of advantages, disadvantages, and alternatives to Def's condition in order to make informed choice as to whether to accept or refuse medication or treatment

KS v Winnebago Cty (In re Mental Cond of KS)
147 Wis. 2d 575
(Ct. App. 1988)

NOTE: Explanation of medically unaccepted and unrecognized alternatives NOT required

St v Wood
2010 WI 17, ¶¶ 34–38
323 Wis. 2d 321

3) Dangerousness finding is unnecessary; dangerousness finding is implicit in § 971.17(3)

St v Wood
2010 WI 17
323 Wis. 2d 321

4) Periodic review of involuntary order required

§ 971.17(3)(c)

5) Report on which motion based must accompany motion and notice of motion and must include statement signed by licensed physician that asserts

a. Def needs medication or treatment

b. Def not competent to refuse medication or treatment

- Statement to be based on examination of individual by licensed physician

6) Hearing must be held within 10 days after filing of motion

a. Evidentiary hearing held before Ct unless DA, Def, and Def's Atty waive opportunity to present evidence

b. If all waive, summary hearing held based on report accompanying motion

c. At request of Def, Def's Atty, or DA, hearing may be postponed up to 20 days after motion filed

§ 971.17(7)(d)

d. On approval by Ct for good cause, testimony may be received on record by telephone or live AV means

7) State must prove Def not competent to refuse medication or treatment by clear and convincing evidence

§ 51.37(9)

D. Conditional transfers or discharges

1) If director of institution to which Def committed judges Def not in such condition as warrants return to Ct but in condition to receive conditional transfer or discharge under supervision, director must report to DHS, committing Ct, and DA of Cty where Ct located, reason for such judgment

a. If Ct does not file objection within 60 days after date of report, director may conditionally transfer Def to legal guardian or other person subject to rules of DHS and DOC

§ 51.37(10)

E. Home visits and leaves of absence

1) Director of State treatment facility may grant home visit or leave for employment or education purposes for up to 15 days

a. Must notify committing Ct and DOC of intent to grant home visit or leave at least 20 days before departure of Def from facility

§ 51.61

F. Rights of Defs committed under § 971.17 same as those for any involuntarily committed person (*see* Patients' Rights in Probate, Guardianship, and Mental Health Benchbook, MH 5) EXCEPT

§ 51.61(1)(i)

1) Persons committed or transferred under § 51.35(3) or § 51.37 or Ch 971 or Ch 975, or detained or committed under Ch 980, and transferred to hospital may be isolated for security reasons within locked facilities in hospital

2) Persons committed or transferred under § 51.35(3) or § 51.37 or Ch 971 or Ch 975, or detained or committed under Ch 980, may be restrained for security reasons during transport to or from facilities

§ 51.64(1)(a)

a. Physical restraint includes all the following

- Locked room
- Device or garment that interferes with individual's freedom of movement and that individual is unable to remove easily
- Restraint by treatment facility staff member by use of physical force

§ 51.61(1)(i)

3) Rights are restricted when patient in maximum security at MMHI. *See* para. 4) below for additional restrictions if person detained or committed under Ch 980

a. May be locked in rooms during night shift and for up to 1-½ hours during each change of shift by staff to permit staff review of patient needs

b. May also be locked in rooms on unit-wide or facility-wide basis as emergency measure as needed for security

- May only be authorized by director of unit or facility or designee and to be approved within one hour after it is authorized by director of MMHI or designee
- Emergency isolation order may only be in effect for time needed to preserve order while dealing with situation and may not be used as substitute for adequate staffing
- Status of each patient must be reviewed every 30 minutes
- If patient in room without toilet, must be given opportunity to use one at least once every hour

c. Each unit in maximum security facility at MMHI and in facility specified under § 980.065 must have written policy covering use of isolation that ensures

- Dignity of individual protected
- Security of individual protected
- Safety of individual secured
- Regular and frequent monitoring by trained staff

§ 51.61(1)(i)2.

4) Additional restrictions if person detained or committed under Ch 980 and placed in facility specified under § 980.065

a. May be locked in room during night shift

- If resides in maximum or medium security unit in which each room has toilet or sink, or
- If resides in unit where each room not equipped with toilet and sink, and number of patients outside their rooms equals or exceeds number of toilets in unit

— Except persons who do not have toilets in room must be given opportunity to use one at least once every hour, or more frequently if medically indicated

§ 51.61(1)(o)

5) Patient at Goodland Hall at MMHI, or patient detained or committed under Ch 980, or patient who is in legal custody of or under supervision of DOC, may be subject to video surveillance or filmed or taped without consent, except not in bedrooms or bathrooms without consent unless patient is engaged in dangerous or disruptive behavior

St v Skamfer
176 Wis. 2d 304
(Ct. App. 1993)

a. Def is considered a prisoner within the meaning of § 940.20(1) (battery by prisoner)

§ 51.61(7)

G. Def committed under § 971.17 may bring suit for damages

1) Patient whose rights protected who suffers damage as result of unlawful denial or violation of rights may bring action against person, State, or any political subdivision that unlawfully denies or violates right

a. Patient may recover actual damages and exemplary damages of not less than $100 for each violation plus costs and reasonable actual Atty fees

2) Patient whose rights protected may bring action against person, State, or any political subdivision, which willfully, knowingly, and unlawfully denies or violates any rights protected

a. Patient may recover actual damages and exemplary damages of not less than $500 or more than $1,000 for each violation, together with costs and reasonable actual Atty fees

- Not a prerequisite that plaintiff suffer or be threatened with actual damages

3) Patient may bring action to enjoin unlawful violation or denial of rights

a. May, in same action, seek damages and recover costs and reasonably actual Atty fees if patient prevails

4) Use of grievance procedure NOT a prerequisite to bringing action

RMC Form CR-275

5. Commitment on Conditional Release

§ 971.17(3)(a)

A. Ct must order conditional release unless Ct finds by clear and convincing evidence that release would pose significant risk of bodily harm to Def or others or of serious property damage

§ 971.17(3)(d)
RMC Form CR-274

B. DHS and Cty Dept under § 51.42 in Cty of Def's residence must prepare plan that identifies treatment services, if any, that Def to receive in community

1) Plan must specify who will be responsible for providing identified treatment and services

§ 971.17(3)(d)

2) Plan must be presented to Ct for approval within 21 days after Ct finding that Def appropriate for conditional release

a. Unless DHS, Cty Dept, and Def request additional time

§ 971.17(3)(e)

C. Conditional release places Def in custody and control of DHS

1) Subject to conditions set by Ct and rules established by DHS

D. Before releasing Def, Ct must notify municipal police dept and Cty sheriff for area where Def to reside

1) Does not apply if written statement waiving right to be notified submitted

6. Violation/Revocation of Conditional Release, Recommitment for Defendants Adjudicated NGI on or After January 1, 1991

A. Violation of conditional release

§ 971.17(3)(e)

1) If DHS alleges Def violated condition or rule or safety requires that conditional release be revoked, Def may be taken into custody under DHS rules

St v Olson
2019 WI App 61, ¶ 2
389 Wis. 2d 257

2) DHS "shall submit" statement showing probable cause for detention and petition to revoke order for conditional release to committing Ct and regional office of SPD within 72 hrs after detention, excluding Saturdays, Sundays, and legal holidays

a. DHS may detain Def in jail or hospital, center, or facility specified by § 51.15(2)(d)

B. Ct action if violation alleged

1) Ct must hear petition within 30 days

a. Unless time deadline waived by Def

b. Unless hearing waived

St v Schertz
2002 WI App 289
¶¶ 8–14
258 Wis. 2d 351

c. 30-day period in § 971.17(3)(e) is directory and not mandatory, but is not permissive or discretionary

2) At hearing, State has burden of proving by clear and convincing evidence that

a. Rule or condition of release violated OR

b. Safety of Def or others requires revocation

3) If Ct determines after hearing that rule or condition violated or safety of Def or others requires revocation of conditional release

a. Ct may revoke order for conditional release and

b. Order Def placed in Winnebago or MMHI until expiration of commitment or until again conditionally released

§ 971.17(7m)
St v Klapps
2021 WI App 5, ¶¶ 16–27, 395 Wis. 2d 743

4) Postdisposition relief may be sought by

a. Postdisposition motion addressing issues not previously raised, such as judicial bias, or

b. Direct appeal to address sufficiency of the evidence or issues already raised

St v Mahone
127 Wis. 2d 364
(Ct. App. 1985)

C. Minimum requirements of due process in revocation/recommitment hearings are

1) Initial hearing to justify detention pending final commitment hearing

2) Written notice of violation

3) Disclosure of evidence against Def

4) Opportunity to be heard in person and to present witnesses and evidence

5) Right to confront and cross-examine adverse witnesses

a. Unless Ct finds good cause for nonconfrontation

6) Neutral and detached hearing body

7) Written statement by fact-finder as to evidence relied on and reasons for revocation

§ 971.17 (1987–88),
as affected by
1989 Wis Act 31

7. Nonfulfillment of Conditional Release, Recommitment for Defendants Adjudicated NGI Before January 1, 1991

§ 971.17(3) (1987–88)

A. Within maximum period for which Def could have been imprisoned if convicted of offense charged

1) If Ct determines after hearing that

a. Conditions of release not fulfilled, and

b. Safety of Def or others requires that conditional release be revoked

2) Ct must immediately order Def recommitted to DHS

a. Subject to discharge or release only in accordance with § 971.17(2) (1987–88)

b. See **Reexamination**, **Secs. 8** and **9**, below

St v Mahone
127 Wis. 2d 364
(Ct. App. 1985)

B. Minimum requirements of due process in revocation/recommitment hearings are

1) Initial hearing to justify detention pending final commitment hearing

2) Written notice of violation

3) Disclosure of evidence against Def

4) Opportunity to be heard in person and to present witnesses and evidence

5) Right to confront and cross-examine adverse witnesses

a. Unless Ct finds good cause for nonconfrontation

6) Neutral and detached hearing body

7) Written statement by fact-finder as to evidence relied on and reasons for revocation

8. Reexamination of Defendants Adjudicated NGI for Offenses Committed on or After January 1, 1991

§ 971.17(4)(a)

A. Committed Def or DHS may petition for conditional release

1) Def may petition committing Ct to modify order by authorizing conditional release if at least 6 months elapsed since

a. Initial commitment order entered, or

b. Most recent release petition denied, or

c. Most recent order for conditional release revoked

2) Director of facility at which Def placed may file petition for conditional release on Def's behalf at any time

§ 971.17(4)(b)

3) Application made to committing Ct with notice to DA

a. If Def files timely petition without Atty, Ct must serve copy on DA and refer to SPD for determination of indigency and appointment of Atty

b. If Def petitions through Atty, Atty must serve DA

§ 971.17(4)(c)

4) Within 20 days after receipt of petition, Ct must appoint one or more examiners to examine Def and furnish written report of examination to Ct within 30 days after appointment

B. Hearing procedure

§ 971.17(7)(a)

1) Committing Ct must conduct all hearings

§ 971.17(4)(d)

2) No right to jury trial

3) Hearing must be held within 30 days after report of Ct-appointed examiner filed with Ct

a. Def may waive time limit

St v RAR
147 Wis. 2d 218
(Ct. App. 1988)

b. Failure of Ct to hold reexamination hearing within statutory time limit does not entitle Def to discharge from commitment

§ 971.17(7)(d)

4) Upon consent of all parties and approval by Ct for good cause, Ct may receive testimony by telephone or live AV means

§ 971.17(7)(b)

5) Def has right to

a. Counsel

b. Remain silent

c. Present and cross-examine witnesses

d. Have hearing recorded by Ct reporter

§ 971.17(7)(c)

C. Examination of Def by physician, psychologist, or expert of Def's choice

1) Upon motion of indigent, Ct must appoint examiner at public expense

2) Examiner for Def or DA must have reasonable access to Def for examination, and

a. Access to Def's past and present treatment records

b. Access to Def's patient health-care records

§ 971.16(4)

3) No testimony regarding mental condition of Def received from physician, psychologist, or expert summoned by Def unless

a. Report of examination transmitted to DA not less than 15 days before trial, and

b. Prosecution afforded opportunity to examine and observe Def if such opportunity seasonably demanded

4) No testimony regarding mental condition of Def received from physician, psychologist, or expert summoned by State unless

a. Written report of examination of Def transmitted to Def's Atty not less than 15 days before trial

§ 971.17(4)(d)
St v Randall (*Randall I*)
192 Wis. 2d 800, 833
(1995)
see also Foucha v
Louisiana
112 SCt 1780 (1992)

D. Sole issue is Def's dangerousness to self or others

1) State bears burden to show Def's continued dangerousness by clear and convincing evidence

2) Ct may consider, without limitation

a. Nature and circumstances of crime

b. Def's mental history and present mental condition

c. Where Def will live

d. How Def will support self

e. What arrangements made to ensure Def has access to and will take necessary medication

f. What arrangements possible for treatment beyond medication

E. Two possible dispositions

§ 971.17(4)(e)

1) Order Def conditionally released

a. DHS and Cty Dept under § 51.42 in Cty of residence of Def must prepare treatment and service plan, if any

b. Plan must specify who is responsible for providing treatment and services identified

c. Plan must be presented to Ct for approval within 60 days after Ct finds Def appropriate for conditional release

- Unless DHS or Cty Dept and Def request additional time

§ 971.17(3)(e)

d. Ct must notify police dept and sheriff where Def to reside of conditional release unless notice waived in writing

2) Recommit to DHS

§ 971.17(5)

F. Petition for termination

1) Def on conditional release, or DHS on Def's behalf, may petition for termination of order of commitment

   a. May not be filed unless at least 6 months elapsed since Def last placed on conditional release or since most recent petition for termination denied

2) Application made to committing Ct, notice to DA

   a. If Def files timely petition without Atty, Ct must serve copy on DA and refer to SPD for determination of indigency and appointment of Atty

   b. If Def petitions through Atty, Atty must serve DA

3) Ct must determine petition as timely as practicable

4) Ct hearing only, no right to jury

St v Randall (*Randall I*)
192 Wis. 2d 800, 833
(1995)

5) Sole issue is Def's dangerousness to self or others

   a. State bears burden by clear and convincing evidence to show Def's continued dangerousness

6) Ct may consider, without limitation

   a. Nature and circumstances of crime

   b. Def's mental history and present mental condition

   c. Def's behavior while on conditional release

   d. Where Def will live

   e. How Def will support self

   f. What arrangements available for treatment and other required services after termination

§ 971.17(8)

9. Reexamination of Defendants Adjudicated NGI for Offenses Committed Before January 1, 1991 is governed by § 971.17(8)

§ 971.17(2) (1987–88)

A. Committed Def or DHS may petition for release

1) Application made to committing Ct

St ex rel Gebarski v Circuit Ct
80 Wis. 2d 489, 491
(1977)

2) Ct trial or jury of six available

3) Notice to DA

B. Hearing

§ 971.17(2) (1987–88)
St ex rel Gebarski v Cir Ct
80 Wis. 2d 489 (1977)
St v Randall (*Randall III*)
2011 WI App 102, ¶ 15
336 Wis. 2d 399

1) Sole issue is Def's dangerousness to self or others

St v Randall (*Randall II*)
222 Wis. 2d 53
(Ct. App. 1998)

a. State bears burden to show Def's continued dangerousness by clear, satisfactory, and convincing evidence

St v Randall (*Randall III*)
2011 WI App 102, ¶¶ 15–16, 336 Wis. 2d 399

b. Ct may consider factors set forth in § 971.17(4)(d) (2009–10)

§ 51.20(16)

2) No hearing before 30 days after original commitment

3) Hearing at Ct's discretion if request between 30 and 120 days after filing

a. Ct, within 24 hours, must order examination to be completed within 7 days by appropriate Cty Dept

4) Hearing must be held on petition for reexamination filed more than 120 days after last hearing on mental condition

a. Held within 30 days after receipt of petition

5) Testimony may be received by telephone or live AV means

a. If Ct approves for good cause

§ 971.17(2) (1987–88)

C. Three possible dispositions

1) Order Def discharged

2) Order Def released

a. Ct may impose conditions

b. Ct must notify municipal police dept and Cty sheriff where Def to reside of conditional release unless notice waived in writing

3) Recommit to DHS

10. Expiration of Commitment Orders

§ 971.17(4) (1987–88)

A. Persons whose offense committed before Jan. 1, 1991—When maximum period for which Def could have been imprisoned if convicted of offense charged has elapsed, Ct must order Def discharged

1) Subject to right of DHS to proceed against Def under Ch 51

2) Ct may order DHS to proceed under § 51.20

a. *See* **Probate, Guardianship, and Mental Health Benchbook, MH 1** for § 51.20 involuntary commitment procedure

§ 971.17(6)

B. Persons whose offense committed on or after Jan. 1, 1991—When maximum period for which Def could have been imprisoned if convicted of offense charged has elapsed, Ct must order Def discharged

1) Subject to right of DHS or appropriate Cty Dept to proceed against Def under Ch 51 or Ch 55

a. Ct may order DHS or Cty Dept to proceed

2) At least 60 days before expiration of commitment order, DHS must notify

a. Committing Ct

b. DA

c. Appropriate Cty Dept

CR 35: MISTRIAL

1. Motion Directed to Sound Discretion of Court

St v Ross
2003 WI App 27, ¶ 47
260 Wis. 2d 291

A. Ct determines whether, in light of whole proceeding, claim of error sufficiently prejudicial to warrant new trial

St v Nienhardt
196 Wis. 2d 161
(Ct. App. 1995)

B. Ct may conduct or allow voir dire of juror(s) to determine potential prejudice

2. Before Declaring a Mistrial, Consider Alternatives

St v Bunch
191 Wis. 2d 501, 506, 512
(Ct. App. 1995)

A. Not all errors warrant mistrial; "the law prefers less drastic alternatives, if available and practical"

B. Examples of alternatives

St v Copening
100 Wis. 2d 700 (1981)

1) Continuance

St v Moeck
2005 WI 57
280 Wis. 2d 277
St v Seefeldt
2003 WI 47
261 Wis. 2d 383

2) Curative instruction

St v Troka
2016 WI App 35
369 Wis. 2d 193

3) Withdraw undisclosed witness or evidence

3. Potential Grounds for Mistrial

A. Hung Jury

1) *See* **CR 24**, **Sec. 9**

B. Juror misconduct

See CR 24, Sec. 4

1) Sleeping or inattentive juror

Am Fam Mut Ins Co
v Shannon
120 Wis. 2d 560 (1984)

2) Unauthorized view of scene

St v Broomfield
223 Wis. 2d 465 (1999)

3) Exposure to extraneous information not in record

St v Nienhardt
196 Wis. 2d 161
(Ct. App. 1995)

4) Communications or contacts with parties, witnesses, or Attys

St v Faucher
227 Wis. 2d 700 (1999)
St v King
120 Wis. 2d 285
(Ct. App. 1984)

5) Familiarity with parties, witnesses, or Attys

Oseman v St
32 Wis. 2d 523, 530
(1966)

6) Reading published articles about case

C. Defense misconduct

St v Williams
2004 WI App 56
270 Wis. 2d 761

1) Improper questioning

St v Moeck
2005 WI 57
280 Wis. 2d 277

2) Improper remarks

D. Prosecutorial misconduct

St v Copening
100 Wis. 2d 700 (1981)

St v Garrity
161 Wis. 2d 842
(Ct. App. 1991)

1) Failure to turn over evidence

St v Barthels
174 Wis. 2d 173 (1993)
limited on other grds by
St v Seefeldt
2003 WI 47
261 Wis. 2d 383

2) Failure to ensure presence of essential witness

St v Jenich
94 Wis. 2d 74 (1980)
St v Tappa
123 Wis. 2d 210
(Ct. App. 1985)
rev'd on other grds
127 Wis. 2d 155 (1985)

3) Improper remarks/argument

St v Fencl
109 Wis. 2d 224 (1982)
limited by
St v Sorenson
143 Wis. 2d 226 (1988)
St v Jaimes
2006 WI App 93
292 Wis. 2d 656

4) Eliciting testimony or commenting on Def's failure to testify at trial, on Def's pretrial silence (if Def does not testify at trial), or on Def's post-*Miranda* silence (if Def testifies at trial)

St v Debrow
2023 WI 54
408 Wis. 2d 178

5) Eliciting testimony alluding to Def's prior criminal history

4. Before Granting Mistrial, Consider Whether Double Jeopardy Will Bar State from Retrying the Case

St v Seefeldt
2003 WI 47, ¶ 19
261 Wis. 2d 383

A. Unless Ct finds "manifest necessity" to terminate trial over Def's objection, State is barred from retrying case

1) "Manifest necessity" means a "high degree" of necessity

St v Green
2023 WI 57, ¶ 24
408 Wis. 2d 248
cert denied
144 S. Ct. 578 (2024)

2) Before deciding that manifest necessity justifies mistrial, Ct should

a. Give parties opportunity to explain positions and consider less drastic alternatives

b. Consider Def's interests in having trial concluded in a single proceeding

c. Ensure record reflects adequate basis for finding manifest necessity

B. Mistrial manifestly necessary when

St v Mink
146 Wis. 2d 1
(Ct. App. 1988)

1) Hung jury

a. *See also* **CR 24**, **Sec. 9**

St v Alvarado
2017 WI App 53, ¶¶ 13–15, 377 Wis. 2d 710

b. Note from jury during deliberations suggesting jury has concluded that State failed to prove one of charges does not prohibit retrial of that charge; although jury's opinion may seem firm, it is not final as long as jury is free to reconsider its opinion, and does not constitute verdict

St v Williams
2004 WI App 56, ¶ 31 & n3
270 Wis. 2d 761

2) Improper conduct of Def or counsel provokes mistrial and there is no alternative

St v Green
2023 WI 57
408 Wis. 2d 248
cert denied
144 S. Ct. 578 (2024)

3) Def's introduction of prejudicial evidence, not yet ruled admissible by Ct, and there is no alternative

C. Mistrial not manifestly necessary—and retrial barred—when Def objects to mistrial and:

St v Copening
100 Wis. 2d 700 (1981)
St v Jaimes
2006 WI App 93
292 Wis. 2d 656

1) State seeks mistrial to gain unfair advantage over Def or to avoid acquittal

St v Barthels
174 Wis. 2d 173 (1993)
limited on other grds by
St v Seefeldt
2003 WI 47
261 Wis. 2d 383

2) Prosecutor knows before trial that key witness is not able to appear but does not notify Ct until after jury sworn

St v Mattox
2006 WI App 110
293 Wis. 2d 840

St v Harp
2005 WI App 250
288 Wis. 2d 441

D. Ct's reasoning for granting mistrial is in error, for example, faulting Def for calling undisclosed alibi witness when witness called by Def was not alibi witness, or finding that contemptible behavior of Def counsel necessitated mistrial when counsel's behavior was not contemptible

St v Moeck
2005 WI 57, ¶¶ 37, 43,
280 Wis. 2d 277
St v Seefeldt
2003 WI 47
261 Wis. 2d 383
St v Troka
2016 WI App 35, ¶¶ 28–32, 369 Wis. 2d 193

E. Mistrial is not manifestly necessary if reasonable alternative to mistrial is available, such as continuance or curative instruction

St v Copening
100 Wis. 2d 700 (1981)
St v Jaimes
2006 WI App 93, ¶¶ 7–8
292 Wis. 2d 656
St v Bunch
191 Wis. 2d 501, 507
(Ct. App. 1995)

F. In general, manifest necessity test does not apply, and Double Jeopardy Clause does not bar retrial, when Def successfully moves for mistrial based on reasons other than prosecutorial overreaching or laxness

CR 36: OTHER TRIAL PROBLEMS

1. Last-Minute Motions for Adjournment

St v Wright
2003 WI App 252, ¶ 49
268 Wis. 2d 694

A. Ct has discretion whether to adjourn

B. Witness unavailability

St v Fink
195 Wis. 2d 330, 339–40
(Ct. App. 1995)

1) 3 factors to consider

a. Actual surprise that could not have been foreseen

b. Whether contradictory or impeaching evidence can be obtained within a reasonable time

c. Whether denial of adjournment will be prejudicial

C. Def's request for new counsel, *see* CR 3, Counsel

2. Stipulation by Def to Element of Crime

St v Wallerman
203 Wis. 2d 158
(Ct. App. 1996)
overruled in part by
St v Veach
2002 WI 110, ¶ 124
255 Wis. 2d 390

A. When Def offers to concede element of offense to avoid introduction of other acts evidence (referred to as *Wallerman* stipulation), Ct and State have discretion whether to accept such concession, even if stipulation complies with *Wallerman* four-part test

Old Chief v US
117 SCt 644, 647 (1997)
St v Veach
2002 WI 110, ¶124
255 Wis. 2d 390

B. When evidence of prior conviction is necessary *solely* to prove element of prior conviction (a Def's status), Ct and State cannot refuse Def's offer to concede prior conviction

St v Alexander
214 Wis. 2d 628, 651
(1997)

Same rule applies in OWI context for evidence of Def's prior convictions, revocations, or suspensions under § 343.307(1)

§ 972.10(4)

3. Motion to Dismiss at Close of State's Case

St v Duda
60 Wis. 2d 431, 439
(1973)
St v Scott
2000 WI App 51, ¶ 12
234 Wis. 2d 129

A. Motion must be denied if, considering State's evidence in the most favorable light, the evidence adduced, believed, and rationally considered, is sufficient to prove guilt beyond a reasonable doubt

St v Scott
2000 WI App 51, ¶ 9
234 Wis. 2d 129

B. Ct should not reserve ruling, but should decide motion before Def decides whether to present evidence

St v Gebarski
90 Wis. 2d 754 (1979)

C. Def waives right to challenge denial of motion on appeal if Def introduces additional evidence; if Def presents evidence, sufficiency of the evidence is determined on all the evidence presented, not just the State's

4. Colloquy with Def about Testifying or Not Testifying

Rock v Arkansas
107 SCt 2704 (1987)

A. Def has due process and 6th Amendment right to testify

St v Weed
2003 WI 85, ¶ 43
263 Wis. 2d 434

B. Ct must conduct colloquy with Def to determine whether

1) Def aware of right to testify

2) Def discussed right with counsel

St v Weed
2003 WI 85, ¶ 42
263 Wis. 2d 434

C. Record must support knowing, intelligent, and voluntary waiver

St v Garcia
2010 WI App 26
323 Wis. 2d 531

D. Failure to conduct colloquy requires evidentiary hearing to determine whether waiver was valid

§ 972.10(4)

5. Motion to Dismiss at Conclusion of All the Evidence

St v Kelley
107 Wis. 2d 540 (1982)

Same standard applies as on a motion to dismiss at the close of the State's case, but Ct considers all the credible evidence, not just the State's

6. Questioning by the Court

St v Carprue
2004 WI 111
274 Wis. 2d 656

Trial Ct may ask questions to clarify, not to advocate

7. Sidebar Conferences

St v McDowell
2003 WI App 168
266 Wis. 2d 599
aff'd, 2004 WI 70
272 Wis. 2d 488
St v Mainiero
189 Wis. 2d 80
(Ct. App. 1994)

A. Appellate courts discourage sidebar conferences, if no contemporaneous record is made

Recommendation	If contemporaneous record cannot be made during sidebar conference, at first opportunity afterwards, outside presence of jury, Ct should summarize conference and ask counsel whether summary is correct

CR 37: THE SENTENCING HEARING

Wis JI-Cr SM-34

1. Conducting the Hearing

Wis Const art I, § 9m
§ 972.14(2m)
§ 950.04(1v)(L), (m)

A. Ct must inquire whether DA complied with consultation requirements of victims' rights law (*See* CR 1)

§ 971.04(1)(g)
§ 967.08
St v Koopmans
202 Wis. 2d 385
(Ct. App. 1996)
aff'd 210 Wis. 2d 670
(1997)

B. Def must be present or any party can petition the Ct to appear by telephone or live audiovisual means

St v Divanovic
200 Wis. 2d 210
(Ct. App. 1996)

But Def may waive by conduct, e.g., refusing to leave jail despite Ct's warning it will proceed

C. Def has right to counsel

D. Establish repeater status, see Secs. 2 and 3 below

E. Determine restitution, see Sec. 10 below

§ 972.15(2)
St v Skaff
152 Wis. 2d 48
(Ct. App. 1989)

F. PSI must be available to DA, Def, and Def's Atty before sentencing; thereafter confidential

1) Ask for corrections, additions, deletions

2) See Sec. 6 below

§ 972.14(2)

G. DA, Def's Atty, and Def may make statement on any matter relevant to the sentence

§ 972.14(3)

H. Statements by others

Wis Const art I, § 9m
950.02(4)(a)4.

1) Ct shall allow victim or family member of deceased victim to make statement or submit written statement to be read in Ct

§ 895.45(2)
St v Johnson
158 Wis. 2d 458
(Ct. App. 1990)

2) Ct may allow others, including a service representative in cases involving abusive conduct, to make or submit statements

3) All statements must be relevant to sentencing

Wis Const art I, § 9m
St v Payette
2008 WI App 106, ¶¶ 51–59, 313 Wis. 2d 39

4) Ct may restrict Def's view of victim

St v Matson
2003 WI App 253
268 Wis. 2d 725

5) Investigating officer breaches plea agreement by requesting longer sentence than DA

St v Stewart
2013 WI App 86
349 Wis. 2d 385

6) Wounded officer speaking as victim does not breach plea agreement

SCR 60.04(1)(g) & cmts
Wis Judicial Comm'n v Piontek
2019 WI 51
386 Wis. 2d 703

I. Judge to consider all information properly presented on notice with opportunity to be heard

St v Skaff
152 Wis. 2d 48
(Ct. App. 1989)

J. Quasi-administrative setting in which many trial-like procedural safeguards do not apply

St v Scherreiks
153 Wis. 2d 510
(Ct. App. 1989)

1) Rules of evidence (other than Ch 905 privileges) do not apply to sentencing

St ex rel Le Febre v Israel
109 Wis. 2d 337 (1982)
St v Norton
2001 WI App 245
248 Wis. 2d 162

2) Def has due-process right to be sentenced on basis of accurate information

St v Rush
147 Wis. 2d 225
(Ct. App. 1988)

3) Exclusionary rule not applicable

§ 972.14(2)

K. Ct must inquire of Def why sentence should not be pronounced

L. Exercise discretion, see Sec. 4, below

St v McReynolds
2022 WI App 25
402 Wis. 2d 175
pet for rev denied

M. Pronounce judgment and impose sentence, see Sec. 7, below

§ 973.017(10m)(b)
St v McReynolds
2022 WI App 25
402 Wis. 2d 175
pet for rev denied

N. State reason for sentencing decision in open court. *See* Sec. 7 below

1) Unless Ct determines not in Def's interest to state reasons in Def's presence

2) If not stated in open court, reasoning must be in writing

§ 973.176(1)

O. Inform convicted felon of prohibition against possession of firearm and of consequences

§ 973.0335

P. Inform convicted felon of prohibition against possession of body armor and of consequences if conviction is for violent felony as described in § 941.291(1)(b)

Q. Award or deny sentence credit, see Sec. 9 below

R. Upon any criminal conviction, DNA sample required, if not already on file with DOJ

§ 165.77(4)

Inform Def of right to request expungement if conviction reversed, set aside, or vacated

§ 973.12(1)

2. Habitual Criminality (Repeater) Penalties

§ 939.62
St v Hopkins
168 Wis. 2d 802 (1992)
St v Wittrock
119 Wis. 2d 664 (1984)

A. Enhancer requires a felony conviction or 3 misdemeanor convictions in 5 years preceding current crime, excluding time in actual confinement serving a sentence

1) "Serving a sentence" includes time spent on a parole hold

§ 939.62(3)(a)

2) Convictions under Chs 341–349 cannot be used as basis for enhancement

St v Delaney
2003 WI 9
259 Wis. 2d 77

3) Crimes under Chs 341–349 can be enhanced by convictions not under Chs 341–349

St v Farr
119 Wis. 2d 651 (1984)
St v Hill
2016 WI App 29
368 Wis. 2d 243

B. Repeater status under § 973.12(1) must be established by personal admission of Def or by evidence at sentencing hearing before imposition of sentence (if not established at plea hearing)

Recommendation
St v Goldstein
182 Wis. 2d 251
(Ct. App. 1994)

1) Trial Judge to ask Def whether Def admits to repeater allegations

St v Liebnitz
231 Wis. 2d 272 (1999)
St v Hill
2016 WI App 29
368 Wis. 2d 243

a. Finding of admission of repeater status by Def may be based on totality of record

2) If Def does not admit to repeater allegations, repeater allegations may be proved

§ 973.12(1)
St v Farr
119 Wis. 2d 651 (1984)

a. By official report of governmental agency, including PSI and judgment of conviction with detail on dates of conviction and/or confinement

§ 346.65(2)
St v Wideman
206 Wis. 2d 91 (1996)

b. In OWIs, by certified copy of conviction or other competent proof, including admission of prior offense by Atty for Def

St v Flowers
221 Wis. 2d 20
(Ct. App. 1998)

c. In sentencing after revocation, revocation summary is prima facie evidence of actual time of incarceration

St v Saunders
2002 WI 107
255 Wis. 2d 589

d. Uncertified copy of prior judgment of conviction may suffice, but certified judgment of conviction remains best evidence

St v Bonds
2006 WI 83
292 Wis. 2d 344

- CCAP report (from WCCA website) may not be used

Witte v US
115 SCt 2199 (1995)

C. Enhanced penalties for habitual criminality do not violate double jeopardy as additional penalties for earlier offense

St v Block
222 Wis. 2d 586
(Ct. App. 1998)
St v Lindsey
203 Wis. 2d 423
(Ct. App. 1996)

D. 3-strikes law is not cruel and inhuman and does not abridge separation of powers or violate equal protection, nor is it arbitrary in creating a class of offenses

St v Radke
2002 WI App 146
256 Wis. 2d 448,
aff'd, 2003 WI 7
259 Wis. 2d 13

E. 2-strikes child sex offense law (§ 939.62(2m)) does not offend substantive due process

§ 939.62
§ 973.12(2)
St v Harris
119 Wis. 2d 612 (1984)
St v Upchurch
101 Wis. 2d 329 (1981)

F. Habitual criminality (repeater) statutes do not authorize Ct to impose 2 separate sentences for one offense; impermissible to impose one regarding the offense and the other regarding the repeater status

St v Harris
119 Wis. 2d 612 (1984)

1) Sec. 939.62 inapplicable unless Trial Ct seeks to impose sentence greater than maximum permitted for a first offender

St v Martin
162 Wis. 2d 883 (1991)

G. Repeater allegation cannot be added after Def has entered not guilty plea to complaint or information that does not contain repeater allegation

St v Caldwell
154 Wis. 2d 683
(Ct. App. 1990)

1) If repeater allegation in complaint, it need not reappear in information

St v Wimmer
152 Wis. 2d 654
(Ct. App. 1989)

H. "Prior conviction" for purposes of enhanced penalty provisions occurs upon finding of guilty, even before sentencing

St v Bush
185 Wis. 2d 716
(Ct. App. 1994)

I. Calculation of enhancement time for attempt equals ½ sentence for the crime as if completed, plus enhancer

§ 973.01(2)(c)
St v Lasanske
2014 WI App 26
353 Wis. 2d 280

J. Enhancer increases term of confinement of felony and overall length of enhanced misdemeanor (But § 973.01(2)(c)1. not applicable to misdemeanors)

§ 973.01(2)(c)
St v Hailes
2023 WI App 29
408 Wis. 2d 465
pet for rev denied

K. Repeat criminality (§ 939.62) or second or subsequent drug offense (§ 961.48) enhancer can be applied, but not both

§ 939.62(2m)

3. Persistent Repeater

St v Collins
2002 WI App 177
256 Wis. 2d 697

A. Ct must make own finding that out-of-state crime is comparable to Wis serious felony

4. Exercising Sentencing Discretion

A. Proper considerations

§ 973.017
St v Gallion
2004 WI 42
270 Wis. 2d 535
St v JEB
161 Wis. 2d 655
(Ct. App. 1991)

1) Court must consider and explain each on the record

St v Bolstad
2021 WI App 81
399 Wis. 2d 815

a. Gravity of offense

b. Character of offender

c. Need to protect public

§ 973.017(2)

2) For felonies committed on or after 2/1/03, Ct must consider

§ 973.017(2)(ad)

a. Protection of the public

§ 973.017(2)(ag)

b. Gravity of the offense

§ 973.017(2)(ak)

c. Def's rehabilitative needs

§ 973.017(2)(b)

d. Aggravating and mitigating factors

Bastian v St
54 Wis. 2d 240 (1972)

3) Probation to be disposition, unless

a. Confinement necessary to protect public from further criminal activity of Def

b. Offender needs correctional treatment available only if confined (community rehabilitation services exhausted)

c. Undue depreciation of seriousness of crime if probation granted

4) Other factors

a. Read-ins, see **Sec. 5.**, below

b. PSI, see **Sec. 6.**, below

St v Von Loh
157 Wis. 2d 91
(Ct. App. 1990)

c. History of criminal offenses, including pending charges

St v Frey
2012 WI 99
343 Wis. 2d 358
St v Leitner
2002 WI 77
253 Wis. 2d 449
St v Von Loh
157 Wis. 2d 91
(Ct. App. 1990)

d. History of undesirable behavior patterns, including dismissed, uncharged, or unproven offenses or facts underlying expunged offenses, and including conduct for which Def was acquitted, if relevant

St v Schordie
214 Wis. 2d 229
(Ct. App. 1997)

e. Acts resulting in probation revocation, even if they result in convictions upon which sentences are separately imposed

f. Def's personality, character, and social traits

g. Vicious or aggravated nature of crime

h. Degree of Def's culpability

i. Def's demeanor at trial and truthfulness

j. Def's age, educational background, and employment record

St v Williams
2018 WI 59
381 Wis. 2d 661

k. Def's remorse, repentance, and cooperativeness

l. Def's need for close rehabilitative control

m. Rights of public

§ 972.14(3)(a)
St v Johnson
158 Wis. 2d 458
(Ct. App. 1990)

n. Recommendations of interested parties, including victims and family members of homicide victims

Wis Const art I, § 9m
St v Spears
220 Wis. 2d 720
(Ct. App. 1998), *aff'd*,
227 Wis. 2d 495 (1999)

o. If victims or their relatives present information regarding victim's good character, Def may present victim's criminal record

St v Gallion
2002 WI App 265
258 Wis. 2d 473,
aff'd, 2004 WI 42
270 Wis. 2d 535

- Victim's character, good or bad, may be relevant

St v Jones
151 Wis. 2d 488
(Ct. App. 1989)

p. Rehabilitative needs of victim

§ 972.15(2s)
St v Crowe
189 Wis. 2d 72

(Ct. App. 1994)
St v Johnson
105 Wis. 2d 657
(Ct. App. 1981)

q. History of Juv delinquency adjudications and contacts short of adjudication

St v Kuba
150 Wis. 2d 618
(Ct. App. 1989)

r. Length of time needed to complete restitution is factor in determining length of probation

Dawson v Delaware
112 SCt 1093 (1992)

s. Political beliefs, if relevant

St v Toliver
187 Wis. 2d 346
(Ct. App. 1994)

t. Sentences of co-Defs

St v Armstrong
2014 WI App 59
354 Wis. 2d 111
see St v Gallion
2004 WI 42, ¶ 43 n11
270 Wis. 2d 535

u. Length of pretrial detention or sentence credit, so long as not for purpose of depriving Def of sentence credit

St v Counihan
2020 WI 12
390 Wis. 2d 172

v. Other sentences imposed in similar cases

St v Loomis
2016 WI 68, ¶ 88
371 Wis. 2d 235

w. Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment relevant to (1) identifying alternatives to prison for low-risk offenders; (2) assessing whether Def can be supervised safely and effectively in the community; and (3) imposing terms and conditions of supervision, and responses to violations

St v Loomis
2016 WI 68, ¶ 68
371 Wis. 2d 235

- Caution: COMPAS risk assessment cannot be a determinative factor at sentencing, i.e., to determine whether offender is incarcerated

St v Loomis
2016 WI 68, ¶ 74
371 Wis. 2d 235

- Caution: Ct must consider that COMPAS merely identifies groups of high-risk offenders, not any one particular high-risk individual

St v Loomis
2016 WI 68, ¶¶ 93–95
371 Wis. 2d 235

- Caution: COMPAS risk assessment may not be used as an aggravating or mitigating factor in determining severity of the sentence, nor to determine the gross length of sentence

St v Loomis
2016 WI 68, ¶ 99
371 Wis. 2d 235

- Caution: Ct must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed

St v Samsa
2015 WI App 6, ¶ 13
359 Wis. 2d 580

- Note: Ct may accept portions of COMPAS assessment and reject others

St v CVC
153 Wis. 2d 145
(Ct. App. 1989)

5) Weight given each relevant factor particularly within wide discretion of Trial Ct

a. Erroneous exercise of discretion when sentence excessive and unusual and so disproportionate to offense committed as to shock public sentiment

b. Erroneous exercise of discretion when sentence violates judgment of reasonable people concerning what is right and proper under circumstances

St v Panknin
217 Wis. 2d 200
(Ct. App. 1998)

6) Not a violation of due process or public records law to deny access to Judge's personal notes made in preparation for or during sentencing

§ 973.046(1r)(a)
St v Williams
2018 WI 59
381 Wis. 2d 661
St v Cox
2018 WI 67
382 Wis. 2d 338
St v Scruggs
2017 WI 15
373 Wis. 2d 312

7) Ct must impose DNA surcharge

a. Must be applied to every count of conviction

b. This requirement deemed not ex post facto

§ 973.055

8) Domestic abuse surcharge is mandatory, but Ct may waive all or part of it if it causes a "negative impact" on Def's family

B. Improper considerations

Scales v St
64 Wis. 2d 485 (1974)

1) Refusal to testify at sentencing hearing

Williams v St
79 Wis. 2d 235 (1977)

2) Exercise of constitutional rights

St v Goodson
2009 WI App 107
316 Wis. 2d 598
St v JEB
161 Wis. 2d 655
(Ct. App. 1991)

3) Preconceived sentencing policy, e.g., "I never give probation for this type of offense…." or "If revoked, you'll get the max!"

St v Tarantino
157 Wis. 2d 199
(Ct. App. 1990)

4) Ct not required to take ABA guidelines into consideration

St v Armstong
2014 WI App 59
354 Wis. 2d 111

5) Length of pretrial detention or sentence credit for purpose of depriving Def of sentence credit

Scales v St
64 Wis. 2d 485 (1974)
St v Carrizales
191 Wis. 2d 85
(Ct. App. 1995)

6) Def's refusal to acknowledge guilt as only or primary factor

a. Acknowledgment of guilt may be viewed as positive factor

St v Fuerst
181 Wis. 2d 903
(Ct. App. 1994)

7) Lack of religious convictions, failure to attend church

St v Betters
2013 WI App 85
349 Wis. 2d 428

8) Judge's own religious beliefs

St v Peebles
2010 WI App 156
330 Wis. 2d 243

9) Admission of wrongdoing made during treatment as condition of probation

St v Alexander
2015 WI 6
360 Wis. 2d 292

10) Admission in compelled statement to probation/parole agent

St v Salas Gayton
2016 WI 58, ¶¶ 25–35
370 Wis. 2d 264

11) Def's nationality or immigration status, except to the extent it bears on permissible factors, e.g., prior disregard for the law, whether community supervision is a realistic option, etc.

C. Imposing concurrent or consecutive sentences

§ 973.15(2)(a)

1) A sentence may be concurrent with or consecutive to any other sentence imposed at the same time or previously

St v Szulczewski
209 Wis. 2d 1
(Ct. App. 1997)
rev'd on other grounds
216 Wis. 2d 495 (1998)
St v Harr
211 Wis. 2d 584
(Ct. App. 1997)

a. A sentence may be concurrent with or consecutive to an NGI commitment in another case

- Ct must determine whether NGI commitment constitutes "legal cause" to stay sentence

St v Anderson
163 Wis. 2d 342
(Ct. App. 1991)

2) Whether to impose concurrent or consecutive sentences rests within discretion of Ct

a. No specific guidelines adopted in Wis

St v Lipke
186 Wis. 2d 358
(Ct. App. 1994)

b. Ct should indicate whether concurrent or consecutive

St v LaTender
86 Wis. 2d 410 (1979)

3) Same factors that apply to length of sentence also apply to whether sentences will run consecutively

a. Gravity of offense

b. Character of Def

c. Need to protect public

St v Strohbeen
147 Wis. 2d 566
(Ct. App. 1988)

4) Sentence may be made consecutive to commitment for failure to pay fines or forfeitures

§ 973.15(2), (3)
St v Toy

125 Wis. 2d 216
(Ct. App. 1985)

5) Consecutive sentences can be consecutive to earlier imposed sentence or earlier federal or out-of-State sentence

St v Thompson
208 Wis. 2d 253
(Ct. App. 1997)

6) Sentence of confinement is permissible consecutive to sentence imposed and stayed

St v Oglesby
2006 WI App 95
292 Wis. 2d 716

7) Second sentence is presumed concurrent in absence of statute or judicial declaration to the contrary

St v Coles
208 Wis. 2d 328
(Ct. App. 1997)

8) If unclear whether sentence is concurrent or consecutive, consider intent of Ct and entire record

D. Imposing sentence after revocation of probation

St v Reynolds
2002 WI App 15
249 Wis. 2d 798

1) If Judge other than original sentencing Judge presides, s/he must acquaint self with trial testimony, PSI, and original sentencing rationale

St v Jones
2005 WI App 259
288 Wis. 2d 475

a. Not necessary in reconfinement hearing

5. Read-Ins

St v Frey
2012 WI 99
343 Wis. 2d 358
Mallon v St
49 Wis. 2d 185 (1970)

A. DA may stipulate with Def to read additional uncharged or dismissed offenses into record

1) DA agrees not to prosecute those offenses

2) Ct may consider those offenses in imposing sentence upon conviction of charged offense

Austin v St
49 Wis. 2d 727 (1971)
ABA Stds—Pleas of
Guilty § 14–3.3 (1999)

3) Should be read in on record

St v Straszkowski
2008 WI 65
310 Wis. 2d 259

St v Cleaves
181 Wis. 2d 73
(Ct. App. 1993)

4) Read-ins are not admissions by Def that he or she committed read-in offenses and should not be deemed so

St v Szarkowitz
157 Wis. 2d 740
(Ct. App. 1990)

a. State prohibited from later charging Def with read-ins

RWS v St (In Int of RWS)
162 Wis. 2d 862 (1991)

5) Ct may impose a more severe sentence for convicted offenses based on read-in offenses

6) May not be used as prior convictions under repeater statute

St v Cleaves
181 Wis. 2d 73
(Ct. App. 1993)

7) May be included in restitution order if so stipulated. *See* **Sec. 10** below

Recommendation

8) For clear understanding of Ct, counsel, and Def, read-ins should be reduced to writing and submitted to Ct on separate document

Include underlying facts

§ 973.042(2)
St v Schmidt
2021 WI 65
397 Wis. 2d 758

9) Read-in child pornography charges may be counted when imposing the $500 per-image surcharge

St v Jones
2021 WI App 15
396 Wis. 2d 602

10) Bond posted for a dismissed complaint or a dismissed but read-in complaint with no restitution must be returned in full and cannot be used for restitution, fines, or costs in a separate complaint

Recommendation
St v Straszkowski
2008 WI 65
310 Wis. 2d 259

B. In plea colloquy, Ct should establish that Def acknowledges responsibility for read-ins, that read-ins may be considered in sentencing, and that Def accepts responsibility for restitution regarding read-ins

6. Presentence Reports

§ 972.15(1)
St v Jackson
187 Wis. 2d 431
(Ct. App. 1994)

A. May be ordered in Ct's discretion in all felonies and in certain specified misdemeanors

Comment

1) DOC may, upon Ct request, prepare PSI in misdemeanor in which Def is subject to prison term because of repeater status

St v Skaff
152 Wis. 2d 48
(Ct. App. 1989)

B. Def has due-process right to read PSI before sentencing notwithstanding § 972.15(2)

§ 972.15(3)

1) Ct may preserve confidential identity of any person who provides information

St v Skaff
152 Wis. 2d 48
(Ct. App. 1989)

a. Ct should state on record what information withheld and why

St v Perez
170 Wis. 2d 130
(Ct. App. 1992)

2) No right to have counsel present during Def's presentence interview

St ex rel Oliver v Guolee
179 Wis. 2d 376
(Ct. App. 1993)

3) Def's Atty has right to PSI on § 974.06 motion

§ 972.15(4)

C. PSI shall be confidential after sentencing and may be released only upon specific authorization of the Ct, EXCEPT:

§ 972.15(4m)
St ex rel SPD v Ct of Appeals (In re St v Buchanan)
2013 WI 31
346 Wis. 2d 735

1) DA and Defense counsel may have and keep copy of PSI

§ 972.15(4m)

2) Self-represented Def may view PSI

St v Parent
2006 WI 132
298 Wis. 2d 63

a. Includes right to review PSI to refute no-merit report

§ 972.15(4r)

3) Victim may view all sentencing recommendations in the PSI and any portion of the PSI that contains information pertaining to the victim

§ 972.15(5)

4) DOC may use PSI for correctional programming, parole consideration, or care and treatment of any person sentenced to imprisonment or intensive sanctions program, placed on probation, released on parole or ES, or

committed to DOC under Ch 51 or Ch 971, or any other person in DOC custody, or for research purposes

§ 972.15(6)

5) DOC, DHS, Def, Def's Atty, DA, examining physician or mental health professional, Ct, and jury may use PSI in Ch 980 (sexual predator) proceeding

D. Correcting errors in PSI

St v Melton
2013 WI 65
349 Wis. 2d 48

1) Errors in PSI should be corrected as part of Def's due-process right to be sentenced based on correct information

a. Def has right to evidentiary hearing

b. Recommendation: Note corrections (whether agreed or found) on the record and order the corrections be attached to all copies of the PSI

St v Bush
185 Wis. 2d 716
(Ct. App. 1994)
St v Johnson
158 Wis. 2d 458
(Ct. App. 1990)

2) Def waives objection to incorrect information in PSI by not correcting information at time of sentencing or at hearing on motion to modify

St v Mosley
201 Wis. 2d 36
(Ct. App. 1996)

3) Not erroneous exercise of discretion to rely on uncontested facts in PSI

7. Stating Sentencing Decision Reasons

A. Ct must

St v Gallion
2004 WI 42
270 Wis. 2d 535
St v Ziegler
2006 WI App 49
289 Wis. 2d 594

1) Specify objectives of sentence, among which may be

a. Protection of community

b. Punishment of Def

c. Rehabilitation of Def

d. Deterrence of others

St v Whitaker
2022 WI 54
402 Wis. 2d 735

2) Describe relevant facts and their nexus to objectives

3) Describe factors considered (*see* **Sec. 4.A.**4) above)

4) Impose minimum amount of custody or confinement consistent with protection of public, gravity of offense, and Def's rehabilitation

5) Explain why duration of sentence or conditions of supervision advance the sentence's objectives

§ 973.176

6) Give the following admonitions in felony cases

a. Firearm prohibition and penalty

b. Voting prohibition

c. Child sex offender working with children

§ 973.0335

d. If violent felony (§ 941.291(1)(b)), body armor prohibition and penalty

§ 973.049(3)

7) In any case with a no-contact condition under § 973.049, Ct must include the prohibition in the judgment of conviction

§ 949.12(1m)
§ 939.617
St v Brott
2023 WI App 45
409 Wis. 2d 96
pet for rev denied

8) Impose mandatory minimum term of initial confinement of three years for child pornography under § 949.12(1m) and § 939.617

B. Improper sentences

Edelman v St
62 Wis. 2d 613 (1974)

1) Ct has no authority to set minimum term

St v Foellmi
57 Wis. 2d 572 (1973)

2) Ct may not sentence with mental reservation to review sentence to determine effect of imprisonment

Scott v St
64 Wis. 2d 54 (1974)

3) Ct has no authority to increase sentence based solely on reflection

St v Burt
2000 WI App 126
237 Wis. 2d 610

a. But Ct can correct concurrent/consecutive error on same day, resulting in increased sentence

St v Willett
2000 WI App 212
238 Wis. 2d 621

b. Ct cannot correct concurrent/consecutive mistake of law 4 months later

St v Gibbons
71 Wis. 2d 94 (1976)

4) Ct cannot specify conditions of prison incarceration

§ 973.09(1)(d)
St v Eckola
2001 WI App 295
249 Wis. 2d 276

5) Jail for less than the mandatory or presumptive minimum time period as a condition of probation

St v Shirikian
2023 WI App 13
406 Wis. 2d 633
pet for rev denied

6) Statute calling for mandatory bifurcated sentence requires term of initial confinement in prison that cannot be imposed and stayed or withheld

St v Gruetzmacher
2004 WI 55
271 Wis. 2d 585

7) Ct's ability to correct error turns on Def's expectation of finality in sentence. No per se double jeopardy rule

8. Pronouncing Sentence for Felonies Committed After 12/31/99 and Misdemeanors Committed After 2/1/03

A. Pronouncing a bifurcated sentence—not life sentence

§ 973.01(1)

1) Required for any felony committed on or after December 31, 1999, and any misdemeanor committed on or after February 1, 2003

2) Total sentence length = Period of initial confinement + period of ES

§ 973.01(2)(d)

a. For all offenses, ES must be greater than 25% of period of initial confinement, except

§ 973.01(2)(d)1.–6.

- Classified felonies (Class B through Class I) also have maximum terms specified by statute

§ 973.01(2)(b)10.

b. For all offenses (except for specified classified felonies or punishable attempt to commit classified felony), period of confinement must not be more than 75% of the total length of sentence

- Example: 5th offense OWI, maximum of 5 years, confinement must be no more than 3.75 years

RMC Form CR-234

3) Ct must inform Def in writing of following

§ 973.01(8)(a)1.

a. Total sentence length

§ 973.01(8)(a)2.

b. Initial period of confinement

§ 973.01(8)(a)3.

c. Length of ES

§ 973.01(8)(a)4.,
§ 302.113(3)

d. Bad time consequences

- Length of confinement time will be increased. ES time will be decreased accordingly

e. Segregation consequences

f. Consequences of frivolous civil suit or false evidence

§ 973.01(8)(a)5.

g. Consequences of violating ES

- Return to confinement for up to balance of total sentence. No credit for street time

§ 302.045(2),
§ 973.01(8)(am)
St v Steele
2001 WI App 160
246 Wis. 2d 744

h. Eligibility for Challenge Incarceration Program (CIP) (boot camp)

St v Lehman
2004 WI App 59
270 Wis. 2d 695

- Ct may order portion of sentence served before CIP

§ 973.01(8)(ag)
§ 302.05

i. Eligibility for Earned Release Program (ERP)/Substance Abuse Program (SAP)

St v White
2004 WI App 237
277 Wis. 2d 580

- Ct may order portion of sentence served before ERP

St v Gramza
2020 WI App 81
395 Wis. 2d 215

- Def must serve mandatory minimum period of confinement despite completing SAP

§ 973.01(5)
St v Larson
2003 WI App 235
268 Wis. 2d 162

4) Ct may impose conditions of ES

a. Conditions may not include confinement

St v Rowan
2012 WI 60
341 Wis. 2d 281
see also Samson v Calif
126 SCt 2193 (2006)

b. Conditions of ES may impinge on constitutional rights as long as the conditions are not overly broad and are reasonably related to Def's rehabilitation

St *v Hoppe*
2014 WI App 51
354 Wis. 2d 219

c. "No drive" condition may not exceed maximum period of revocation under Ch 343

d. *See also* **Conditions of Probation**, **CR 38, Sec. 4.D.**

B. Pronouncing a life sentence

1) Impose sentence

2) Determine ES eligibility. Three options:

§ 973.014(1g)(a)1.

a. ES eligibility in 20 years

§ 973.014(1g)(a)2.

b. ES eligibility at some date later than 20 years

§ 973.014(1g)(a)3.

c. No ES eligibility

§ 973.014(1g)(b)
§ 302.114(3)–(5)
RMC Form CR-235

3) Ct must inform Def of

a. Bad time consequences

- Length of confinement time will be increased. ES time will be decreased accordingly

b. Segregation consequences

c. Consequences of frivolous civil suit or false evidence

d. Procedure for petitioning for release to ES

St v Volk
2002 WI App 274
258 Wis. 2d 584

C. Imposing a sentence with enhancer(s)

1) Enhancer applies only to period of confinement

§ 973.155
Wis JI-Cr SM-34A

9. Sentence Credit

Recommendation

A. Ct should make specific finding of number of days' credit in judgment of conviction

St v Villalobos
196 Wis. 2d 141
(Ct. App. 1995)

1) Def has burden of showing connection between custody and conduct for which sentence imposed

St v Magnuson
2000 WI 19
233 Wis. 2d 40

2) Offender's status constitutes custody for credit purposes when offender subject to escape charge for leaving that status

St v Carter
2010 WI 77
327 Wis. 2d 1
St v Boettcher
144 Wis. 2d 86 (1988)
Klimas v St
75 Wis. 2d 244 (1977)

B. Credit given for time in custody in connection with course of conduct for which Def sentenced, including time spent unable to make bail

1) Awaiting trial

St v Trepanier
2014 WI App 105
357 Wis. 2d 662

a. Credit granted for sentence on criminal offense even if Def also in custody for civil contempt with right to purge, DESPITE Ct ordering sentence consecutive to contempt

2) Being tried

3) Awaiting sentence

St v Boettcher
144 Wis. 2d 86 (1988)
St v Thomas
2021 WI App 59
399 Wis. 2d 165

4) On probation or parole hold (whether federal or state) for same course of conduct as that resulting in conviction in question, if concurrent sentence is imposed

St v Baker
179 Wis. 2d 655
(Ct. App. 1993)

5) Secure custody pending waiver hearing credited against sentence

St v Thompson
225 Wis. 2d 578
(Ct. App. 1999)

6) Secure custody following Juv commitment for violation of aftercare supervision, even though arising out of same course of conduct

St v Gilbert
115 Wis. 2d 371 (1983)

7) Def entitled to credit for time spent in jail as condition of probation

St v Johnson
2009 WI 57
318 Wis. 2d 21

8) Amount of credit granted on concurrent sentences not necessarily equal. Compute credit for each "course of conduct" separately

St v McClinton
195 Wis. 2d 344
(Ct. App. 1995)

9) Def who receives conditional jail time equal to minimum mandatory sentence is entitled to good time credit

St v Carter
2010 WI 77
327 Wis. 2d 1

10) Def entitled to credit for time held in other state on executed Wis warrant and other state probation violation warrant until other state sentence imposed if Wis sentence later made concurrent

St v Zahurones
2019 WI App 57
389 Wis. 2d 69

11) A count subject to a deferred entry of judgment for the same course of conduct as sentencing-after-revocation counts shall be entitled to the same credit

§ 973.10(2)(b)
St v Slater
2021 WI App 88
400 Wis. 2d 93

12) Time spent in custody from probation or extended supervision hold until received by the prison

13) See also **Conditions of Probation**, **CR 38, Sec. 4**

St v Kontny
2020 WI App 30, ¶ 10
392 Wis. 2d 311
St v Johnson
2018 WI App 2
379 Wis. 2d 684

C. A day of sentence credit for each calendar day during which Def spent at least part of the day in custody

D. Credit not given

St v Kontny
2020 WI App 30, ¶ 12
392 Wis. 2d 311

1) The day of sentencing is not a day of credit

Wilson v St
82 Wis. 2d 657 (1978)
St v Wolfe
2001 WI App 66
242 Wis. 2d 426

2) If sentences consecutive, Def to receive credit on first sentence

St v Boettcher
144 Wis. 2d 86 (1988)

a. Even if sentence imposed is for crime that resulted in probation hold or triggered probation revocation

St v Rohl
160 Wis. 2d 325
(Ct. App. 1991)
St v Morrick
147 Wis. 2d 185
(Ct. App. 1988)

3) If sentences independent of each other and served at different times, dual credit not allowed

St v Beets
124 Wis. 2d 372 (1985)

4) Time served on sentence after revocation and before sentencing on revocation-triggering offense not to be credited against later sentence on revocation-triggering offense

St v Abbott
207 Wis. 2d 624
(Ct. App. 1996)

5) DIS confinement sanction not to be applied as credit against sentence on offense that triggered DIS sanction

St v Chapman
175 Wis. 2d 231
(Ct. App. 1993)

6) Life-means-life sentencing for crimes committed before Dec. 31, 1999, § 973.014(2) (now § 973.014(1)(b)), does not require presentence time credit against parole eligibility date

St v Seeley
212 Wis. 2d 75
(Ct. App. 1997)

7) Ct may deny sentence credit for presentence jail time when setting parole eligibility under § 973.014(1)(b) for crimes committed before Dec. 31, 1999

St v Cobb
135 Wis. 2d 181
(Ct. App. 1986)

8) Time spent in treatment as condition of probation not credited unless Def locked in at night

St v Pettis
149 Wis. 2d 207
(Ct. App. 1989)

9) Home detention as condition of bail does not count as "custody" and does not produce credit for time served

St v Villalobos
196 Wis. 2d 141
(Ct. App. 1995)
St v Demars
119 Wis. 2d 19
(Ct. App. 1984)

10) Unexecuted arrest warrant or detainer from another Cty on another offense not sufficient connection if Def is being held on other grounds

St v Johnson
2007 WI 107
304 Wis. 2d 318

11) Time in Juv institution that would have been ordered even if no new crime

St ex rel Baade v Hayes
2015 WI App 71
365 Wis. 2d 174

12) Good time earned on probationary condition time

St v Friedlander
2019 WI 22
385 Wis. 2d 633

13) Credit for time spent at liberty after mistakenly released from incarceration

St v Harrison
2020 WI 35
391 Wis. 2d 161

14) Incarceration for a prior vacated conviction and sentence that is not part of the same course of conduct

E. Def to receive day-for-day credit for all jail time against total incarceration for same course of conduct for which ultimately sentenced

St v Fermanich
2023 WI 48
407 Wis. 2d 693
St v Floyd
2000 WI 14
232 Wis. 2d 767

F. Credit given for confinement on charges dismissed and read in at sentencing

10. Restitution

A. General principles

§ 973.09(1)(b)
§ 973.20(1r)
St v Evans
2000 WI App 178
238 Wis. 2d 411

1) Required to be determined before imposing sentence or ordering probation

a. Unless Ct finds substantial reason not to order, stating reasons on record

St v Borst
181 Wis. 2d 118
(Ct. App. 1993)

b. Sentence is illegal unless restitution is ordered

St v Muth
2020 WI 65
392 Wis. 2d 578
St v Walters
224 Wis. 2d 897
(Ct. App. 1999)
St v Dugan
193 Wis. 2d 610
(Ct. App. 1995)

2) Restitution serves penal goals of rehabilitation, punishment, and deterrence

a. Advisement during plea colloquy not required

3) Can be in addition to any other penalty

§ 973.20(1r)
St v Cleaves
181 Wis. 2d 73
(Ct. App. 1993)

4) Permitted for read-ins

5) Payable to

§ 973.20(1r)

a. Victim or victim's estate

St v Hoseman
2011 WI App 88
334 Wis. 2d 415
St v Vanbeek
2009 WI App 37
316 Wis. 2d 527
St v Howard-Hastings
218 Wis. 2d 152
(Ct. App. 1998)

- "Victim" in § 973.20 includes direct victims of crime and may include governmental entities, and

St v Gahart
2022 WI App 61
405 Wis. 2d 375
St v Gribble
2001 WI App 227
248 Wis. 2d 409

- Parent, guardian, legal custodian of child victim, including minor passenger of a driver convicted of OWI with minor passenger offense

§ 973.20(5)(d)

b. Insurer or surety that has paid claim, if justice requires

St v Baker
2001 WI App 100
243 Wis. 2d 77

- Includes Medical Assistance

§ 973.20(9)(a)

c. Victim compensation fund

- Subordinate to claims of victims suffering loss

§ 973.20(11)(a)

6) Surcharge of 5% of amount of restitution imposed for administrative expenses

§ 973.20(10)(a)

7) Payment schedule set

a. Can be payable immediately, within specified time or in specified installments

b. Payment period cannot be longer than end of probation, parole, or extended supervision (ES)

St ex rel Ortiz v Carr
2022 WI App 16
401 Wis. 2d 450

c. Ct may order deduction of percentage of prison wages and gifts during initial confinement

Huml v Vlazny
2006 WI 87
293 Wis. 2d 169

8) Civil settlement does not affect enforcement of criminal restitution order unless double recovery would result. But civil settlement may bar enforcement of civil judgment converted from criminal restitution order

B. Restitution hearing

§ 973.20(13)(b)

1) DA must attempt to obtain information regarding amount of loss suffered by any victim as result of the crime

§ 973.20(13)(a)

2) Factors to be considered

a. Amount of loss suffered by victim(s)

b. Financial resources of Def

St v Kenyon
225 Wis. 2d 657
(Ct. App. 1999)

- Ct may not order liquidation of ERISA plan with anti-alienation clause

St v Loutsch
2003 WI App 16
259 Wis. 2d 901

c. Present and future earning ability of Def

St v Fernandez
2009 WI 29
316 Wis. 2d 598

- But length of sentence does not limit total that may be ordered

d. Needs and earning ability of Def's dependents

Herr v Lanaghan
2006 WI App 29
289 Wis. 2d 440
St v Walters
224 Wis. 2d 897
(Ct. App. 1999)

e. Civil settlement and allocation between general and special damages

f. Any other factors Ct deems appropriate

§ 973.20(14)(a)
St v Madlock
230 Wis. 2d 324
(Ct. App. 1999)

3) Burden of proving loss, both amount and causation, by preponderance of evidence is on victim

St v Walters
224 Wis. 2d 897
(Ct. App. 1999)

4) Burden on Def to prove special damages in allocation between general and special damages

St v Muth
2020 WI 65
392 Wis. 2d 578

Special damages are excluded from restitution only if enumerated in a civil settlement

St v Szarkowitz
157 Wis. 2d 740
(Ct. App. 1990)

5) Burden regarding financial resources, earning ability, and needs of dependents is on Def

§ 973.20(14)(b)
St v Sweat
208 Wis. 2d 409 (1997)

6) Def may assert any defense that could be raised in civil action

a. Except criminal, not civil, statute of limitation applies

St v Knoll
2000 WI App 135
237 Wis. 2d 384

b. Contributory negligence not a defense to restitution

§ 973.20(13)(c)
St v Krohn
2002 WI App 96
252 Wis. 2d 757
St v Evans
2000 WI App 178
238 Wis. 2d 411

7) When restitution ordered but amount unable to be determined, 4 options:

a. Order restitution of amounts not in dispute as part of sentence or probation order imposed and direct appropriate agency to file proposed restitution order with Ct within 90 days

b. Adjourn sentencing for up to 60 days pending resolution of amount of restitution by Ct

c. With consent of Def, refer disputed restitution issues to arbitrator acceptable to all parties, whose determination of amount of restitution shall be filed with Ct within 60 days

d. Refer disputed restitution issues to Cir Ct Comm'r or other appropriate referee, who shall conduct hearing and submit record of hearing, together with proposed findings of fact and conclusions of law, to Ct within 60 days after date of referral. Within 30 days after referee's report filed, Ct shall determine amount of restitution

St v Hopkins
196 Wis. 2d 36
(Ct. App. 1995)

8) If Def fails at sentencing to object to restitution indicated in PSI, Ct may order such restitution to be paid

§ 973.20(14)

9) Procedural rules

a. Parties in interest have right to be heard, present evidence, and cross-examine witnesses

St v Dziuba
148 Wis. 2d 108 (1989)

b. No right to jury trial on amount of restitution

c. Ct, arbitrator, or referee may waive rules of practice, procedure, pleading, or evidence (except matter of privilege)

d. Discovery not available unless good cause shown

e. Def may participate by telephone under § 807.13

§ 973.20(13)(c)2.
St v Perry
181 Wis. 2d 43
(Ct. App. 1993)

f. 60-day restitution determination period is directory not mandatory

§ 973.20(13)(c)
St v Simonetto
2000 WI App 17
232 Wis. 2d 315

g. Maximum period that order for restitution may be held open is 90 days after imposition of sentence

§ 973.20(2), (3), (4), (5)

C. Losses that may be included in restitution order

St v Heyn
155 Wis. 2d 621 (1990)

1) Ct has broad authority to impose reasonable and appropriate restitution as condition of probation under § 973.09(1)(a), even if amount not an item of pecuniary loss, e.g., installation of burglar alarm system

§ 973.20(5)(a)
St v Anderson
215 Wis. 2d 673
(Ct. App. 1997)
St v Stowers
177 Wis. 2d 798
(Ct. App. 1993)

a. Limits restitution to special damages, construed broadly

§ 973.20(4m)

b. Includes cost of psychiatric and psychological care and services under certain circumstances

2) Property loss: Return of property or reasonable repair or replacement cost

St v Huntington
132 Wis. 2d 25
(Ct. App. 1986)

a. Def may be liable for full amount of theft even if received less than full amount from the theft

§ 973.20(2)(am)
St v Stone
2021 WI App 84
400 Wis. 2d 197
St v Kennedy
190 Wis. 2d 252
(Ct. App. 1994)

b. Reasonable repair or replacement cost not limited to fair market value of property at time stolen

St v Johnson
2005 WI App 201
287 Wis. 2d 381

c. Ct may consider victim's lost profits

St v Gibson
2012 WI App 103
344 Wis. 2d 220

d. Def may be liable for full amount of insurance claim paid (and for deductible) despite subsequent recovery of stolen car

3) Bodily injury: Necessary medical and related services; cost of necessary physical and occupational rehabilitation; lost income; payments to ensure duties of victim/homemaker are continued until victim can resume duties

§ 973.20(4)

4) Death: Necessary funeral and related services under § 895.04

§ 973.20(5)(a)–(c)
St v Rouse
2002 WI App 107
254 Wis. 2d 761
St v Holmgren
229 Wis. 2d 358
(Ct. App. 1999)
St v Anderson
215 Wis. 2d 673
(Ct. App. 1997)
St v Handley
173 Wis. 2d 838
(Ct. App. 1993)

5) In all cases: Special but not general damages as in civil action; out-of-pocket expenses of victim; cost or rewards paid for information; lost income; actual Atty fees incurred in civil suit; investigative expenses

St v Brown
174 Wis. 2d 550
(Ct. App. 1993)

6) Tuition for victim

St v Muth
2020 WI 65
392 Wis. 2d 578

7) Victim's spouse's lost wages

D. Losses that may not be included in restitution

St v Lasecki
2020 WI App 36
392 Wis. 2d 807
St v Stowers
177 Wis. 2d 798
(Ct. App. 1993)

1) General damages to victim, i.e., nonpecuniary damages

St v Hufford
186 Wis. 2d 461
(Ct. App. 1994)

2) Interest

St v Lee
2008 WI App 185
314 Wis. 2d 764

St v Schmaling
198 Wis. 2d 756
(Ct. App. 1995)

3) Expenses incurred by non-victims

St v Torpen
2001 WI App 273
248 Wis. 2d 951

4) Outstanding restitution in unrelated cases

St v Oakley
2000 WI 37
234 Wis. 2d 528

5) Fines in unrelated cases

St v Storlie
2002 WI App 163
256 Wis. 2d 500

6) Collateral expenses incurred in normal course of law enforcement

§ 973.20(11)

E. Payment of restitution

1) Payment to DOC if Def sentenced to prison or placed on probation

§ 973.20(11)(c)

a. Ct shall require Def to authorize DOC to collect, from wages and Def's prison account, an amount or a percentage DOC determines is reasonable for payment to victims

2) Payment to Clerk of Ct if Def not placed on probation, not sentenced to prison

3) 5% surcharge on restitution for collection by either Clerk or DOC

§ 304.074(3m)

4) DOC may not collect supervision fee until restitution has been paid in full

§ 71.93(1)(a)7m.
§ 71.935

5) Restitution may be collected by tax intercept and state debt collection

§ 969.02(6)
§ 969.03(4)

6) Use bail for restitution and judgment

§ 973.20(12)

F. Form of order for restitution

1) Single order covering all payments and any amounts due under § 304.074

a. Fines

b. Costs

c. Fees

d. Surcharges

2) Order can be revised later to include costs for legal representation by private Atty under § 977.08 or fees due under § 304.074

St ex rel Bryson v Carr
2022 WI App 34
404 Wis. 2d 307
St ex rel Ortiz v Carr
2022 WI App 16
401 Wis. 2d 450

3) Ct may order deduction of percentage of prison wages and gifts during initial confinement for restitution and Ct fees

G. If ordered payments not made

§ 973.20(1r)

1) If Def not on probation, parole, or ES, restitution enforceable as a civil judgment or under Ch 785

2) If Def on probation

§ 973.09(3)(b)

a. Hold probation review hearing before probation expires

- Hearing may be waived

b. Extend probation or discontinue order if substantial reasons to do so

c. If probation not extended, issue judgment for unpaid restitution, unless victim has already recovered a judgment against Def

d. Send notice of civil judgment to Def at last-known address

§ 973.20(1r)

e. If probation not extended, restitution may be enforced as a civil judgment or under Ch 785

§ 972.13
RMC Form CR-204

11. Judgment of Conviction

A. Must be in writing and signed by clerk or Judge

B. Must set forth plea, verdict or finding, adjudication, sentence, and sentence credit

§ 973.08

C. Copy of judgment of conviction and order for restitution to accompany prisoner

1) Transcript of sentencing proceedings filed with institution within 120 days

D. Ct may submit "Sentenced Offender Report" with copy of "Judgment of Conviction" to provide DOC with sentencing information and recommendations on treatment needs of Def

RMC Form CR-233

12. Notice of Right to Appeal

§ 973.18
§ 809.30(1)(f)

A. Required by statute no matter what plea or sentence

St v Argiz
101 Wis. 2d 546 (1981)

B. Method

§ 973.18

1) Give Def two copies of appeal rights

2) Have Def sign and date acknowledgment that Def

   a. Received copy

   b. Read and understood copy

   c. Discussed rights with defense Atty

3) Have Def's Atty certify in writing that rights discussed with Def

4) File copy in open Ct

5) Answer any questions by Def about appeal rights

13. Stay of Execution

§ 973.15(8)

A. Sentencing Ct may stay execution of sentence of imprisonment or to intensive sanctions program only

St v Szulczewski
216 Wis. 2d 495 (1998)
Weston v St

28 Wis. 2d 136 (1965)
Reinex v St
51 Wis. 152 (1881)

1) For legal cause, or

2) Under § 973.09(1)(a) for probation, or

3) For not more than 60 days, for any reason

a. Does not apply to 3rd and subsequent OWI convictions

§ 968.20

14. Return of Seized Property

§ 968.20(1), (1g)

A. Generally, person entitled to possession may petition for return of seized property if

1) No longer needed as evidence, or

2) Proceedings completed

§ 968.20(1m)

B. Dangerous weapon or ammunition

1) May not be returned to person who used it in crime

2) May be returned to owner to had no prior knowledge and did not consent to crime

18 USC 922(g)(9)
Leonard v St
2015 WI App 57
364 Wis. 2d 491

3) Firearm or ammunition may not be returned to person with a conviction for a misdemeanor crime of domestic violence

§ 968.20(1g)
St v Voshart
39 Wis. 2d 419 (1968)

C. Contraband may not be returned

§ 971.109

D. Ct may freeze or seize the assets of person charged with financial exploitation of elder person before conviction

15. Reconfinement

A. Is akin to sentencing

B. Recommendation: review PSI

St v Brown
2006 WI 131
298 Wis. 2d 37

C. Ct should consider and explain relevance of factors, including

1) Recommendation from DOC

2) Nature and severity of original offense

3) Institutional conduct record

4) Conduct and nature of violation of terms and conditions during ES

5) Amount of incarceration necessary to protect public

6) Minimum amount of confinement that is consistent with protection of public, gravity of the offense, and Def's rehabilitative needs

7) Prior record, attitude, capacity for rehabilitation, and rehabilitative goals to be accomplished

St v Hines
2007 WI App 39
300 Wis. 2d 485

D. Ct must permit allocution

E. Credit

§ 304.072
St v Presley
2006 WI App 82
292 Wis. 2d 734

St v Obriecht
2015 WI 66
363 Wis. 2d 816

1) Offender sentenced after revocation entitled to credit for time spent in custody until entering a prison

2) Sec. 302.11(7)(b) does not bar parolee sentenced after revocation from receiving credit for earlier time in custody

CR 38: OPTIONS FOR SENTENCING

1. Deferred Prosecution

St v Wollenberg
2004 WI App 20
268 Wis. 2d 810

A. Deferred prosecution agreement and deferred entry of judgment are different

§ 971.37
St v Kaczmarski
2009 WI App 117
320 Wis. 2d 811

B. In enumerated battery and domestic and child sexual abuse cases, DA may have Def enter into written agreement with specified conditions for specified period

§ 971.37(3)

1) If agreement complied with, Ct must dismiss charge with prejudice

§ 971.37(2)

2) Agreement may be terminated upon written notice of Def or DA before expiration of specified period

§ 971.37(1m)(b)

C. Deferred prosecution agreement must be in writing signed by DA or designee and Def

§ 971.37(5)

D. Deferred prosecution agreements may be used for crimes other than those listed under § 971.37(1m)

E. Ct has discretion to hold case open on motion of DA for subsequent dismissal if conditions for doing so met

§ 971.37(4)

F. Consent to deferred prosecution or statements to deferred prosecution staff not admissible in evidence at later trial

§ 961.47(1)

G. Drug offenders

1) If first-time drug offender pleads or is found guilty of possession or attempted possession of controlled substance under § 961.41(3g), Ct may

a. Without entering judgment and with consent of Def

b. Defer prosecution

c. Place Def on probation with terms and conditions

St v Boyer
198 Wis. 2d 837
(Ct. App. 1995)

d. Section 961.47(1) disposition not available in cases under § 961.41(3g)(e) possession of THC

§ 961.47(1)

2) If Def violates terms or conditions, Ct may

a. Enter adjudication of guilt and

b. Proceed as otherwise provided

3) If Def fulfills terms, Ct must

a. Discharge Def

b. Dismiss proceedings

4) Discharge and dismissal NOT a conviction for a crime

§ 973.015

2. Expunction

Wis JI-Cr SM-36

A. Ct may order expunction of record of conviction of Class H felony or lesser offense upon completion of sentence if determines

1) Person under 25 at time of commission of offense, and

2) Person will benefit from expunction of record, and

3) Society will not be harmed

B. Expunction not available:

See § 973.015(1m)(a)3.

1) Certain Class H and Class I felonies excepted

Kenosha Cty v Frett
2014 WI App 127
359 Wis. 2d 246

2) Civil forfeiture conviction

§ 973.015(1m)(a)2.

C. Ct shall order at time of sentencing that the record be expunged upon successful completion of sentence if

1) Offense was violation of § 942.08(2)(b), (c), or (d) or (3) (Peeping Tom offenses), and

2) Person was under 18 when offense was committed

St v Hemp
2014 WI 129
359 Wis. 2d 320

D. Successful completion of probation (or imprisonment) entitles Def to expunction

§ 973.015(1m)(b)

1) Successful completion of probation is when

a. Probationer has not been convicted of subsequent offense

b. Probation has not been revoked

St v Lickes
2021 WI 60
397 Wis. 2d 586

c. Probationer has satisfied the conditions of probation established by the Ct and DOC

§ 973.015(1m)(b)

2) Detaining or probation authority must forward certificate of discharge to Ct

St v Ozuna
2017 WI 64, ¶ 14
376 Wis. 2d 1

3) Ct may independently review whether probation successfully completed

SCR 72.06

E. To expunge Ct record, Clerk of Ct must remove any paper index and nonfinancial Ct record and place in case file; electronically remove any automated nonfinancial record, except case number; seal entire case file; and keep for retention period appropriate for case type

St v Anderson
160 Wis. 2d 435
(Ct. App. 1991)

1) Expunged conviction may not later be used for impeachment

St v Leitner
2002 WI 77
253 Wis. 2d 449

F. Expunged record is only Ct record, not DA or police record

St v Meinhardt
2012 WI App 82
343 Wis. 2d 588
see also 2009 Wis Act 28,
§§ 3384–3386, 9309, 9400

G. 2009 amendment of § 973.015 applies only for sentences ordered on and after July 1, 2009

St v Matasek
2014 WI 27
353 Wis. 2d 601

H. Ct may grant expunction only at time of sentencing, not after review of performance of sentence

See St v Arberry
2018 WI 7, ¶ 16 & n8
379 Wis. 2d 254

1) Failure to raise expunction at sentencing is not a new factor for a sentence modification

St v Allen
2017 WI 7
373 Wis. 2d 98

I. Effect of expunction: The sentencing Ct is prohibited from using the record of conviction itself to enhance a sentence; the expunged record of conviction cannot form the basis of repeater allegations; and the expunged record of conviction may not be used to impeach a witness on cross-examination

3. Fines

§ 973.05

A. Statutory provisions

1) Payable immediately, unless Ct grants period of time not to exceed 60 days to pay

§ 973.05(1m)

2) If restitution ordered, Ct may authorize payment period in excess of 60 days for all obligations, including restitution, fines, and related payments

§ 973.05(2)

3) Ct may make payment of fine a condition of probation

§ 973.05(3)

4) Portion or all of fine may be stayed for Def to perform community service

a. Ct may not stay statutory costs and surcharges

§ 973.07

5) If fine not paid, Def may be committed to Cty jail until fine, costs, and surcharges paid or Def discharged, but not to exceed 6 months

a. May not commit indigent Def

§ 969.03(4)
St v Iglesias
185 Wis. 2d 117 (1994)

6) Fines and costs shall be paid out of bail money, after restitution, even if posted by someone else

St v Branch
2015 WI App 65
364 Wis. 2d 582

a. Fines and costs may not be paid from money unassociated with crime

B. Criteria

Will v St
84 Wis. 2d 397 (1978)

1) Appropriate when incarceration or rehabilitation unnecessary

2) Appropriate when money deprivation may have deterrent effect

3) Def must have ability to pay fine set

St v Vesper
2018 WI App 31, ¶¶ 13–26, 382 Wis. 2d 207
St v Ramel
2007 WI App 271
306 Wis. 2d 654

4) Reasoning must be stated on record but need not be stated separately

C. Recommended procedure

Will v St
84 Wis. 2d 397 (1978)

1) Determine Def's ability to pay at time of sentencing

2) Provide for payment of fine in installments with sufficient time to pay

a. Ct may give Def more than statutory 60 days to pay

b. Def has burden to apply to Ct and prove inability to pay before fine due or commitment issued for nonpayment

3) Set alternative penalty for nonpayment of fine at time of sentencing

4. Probation

See generally ABA Stds—Sentencing § 18-3.13 (1994)

A. Criteria

§ 973.09(1)(c)

1) Not available if:

a. Def convicted of Class A felony with penalty of life imprisonment, or

§ 973.09(1)(a)

b. Probation is prohibited for a particular offense by statute

§ 939.616(1r)
St v Lalicata
2012 WI App 138
345 Wis. 2d 342

- E.g., 1st-degree sexual assault of child under 12

St v Balgie
76 Wis. 2d 206 (1977)

2) Not permissible when Def is brought back into Ct for sentencing when probation revoked on withheld sentence

Bastian v St
54 Wis. 2d 240 (1972)

3) Probation decision should not turn on generalizations about types of offenses or existence of prior criminal record

St v Martin
100 Wis. 2d 326
(Ct. App. 1981)

a. Erroneous exercise of discretion for Ct to uniformly refuse to consider probation for certain offenses even though probation available sentencing alternative

b. Should be rooted in facts and circumstances of each case

Garski v St
75 Wis. 2d 62 (1977)

4) Ct should consider

a. Nature and circumstances of crime

b. History and character of offender

c. Availability of institutional and community services

St v Kuba
150 Wis. 2d 618
(Ct. App. 1989)

5) Ct may consider time necessary for Def to pay restitution

6) Whether Def pleads guilty or not guilty or intends to appeal not relevant to appropriateness of probation as a sentence

St v Oakley
2001 WI 103
245 Wis. 2d 447

7) Purpose is to rehabilitate and protect society without placing Def in prison

B. Two types of probation

§ 973.09(1)

1) Sentence withheld and Def placed on probation

2) Sentence imposed, but execution stayed and Def placed on probation

3) Difference is that upon revocation, imposed and stayed sentence will automatically go into effect without further Ct review

C. Length of probation

§ 973.09(2)

1) Misdemeanors

a. Not less than 6 months nor more than 2 years for the following:

- Misdemeanor that Def committed while possessing a firearm
- Misdemeanor that was act of domestic abuse, as defined in § 968.075(1)(a)
- Misdemeanor under § 940.225(3m) (4th-degree sexual assault) or Ch 948 (crime against child)

§ 973.09(2)(a)1.d.

- OWI-related misdemeanor under §§ 23.33(4c) or (4p)(e), 23.335(12)(a), (b), or (h), 30.681, 30.684(5), 350.101, 350.104(5), or 350.17, or misdemeanor under § 346.63 to which § 973.09(1)(d) applies

b. Not less than 6 months nor more than 1 year for Class A misdemeanors not covered under para. a. above

c. Not more than one year for misdemeanors not covered under paras. a. or b. above

§ 973.09(2)(a)2.

d. Maximum increased by:

- 1 year if there are 2–4 misdemeanor convictions at the same time
- 2 years if there are 5 or more

St v Reagles
177 Wis. 2d 168
(Ct. App. 1993)

e. Maximum misdemeanor probation term NOT increased by additional felony conviction

2) Felonies: Not less than 1 year nor more than maximum term of confinement in prison for offense or 3 years, whichever is greater

a. Up to 1 additional year of probation for each felony, if Def convicted of 2 or more crimes, including at least 1 felony

3) If convicted with a penalty enhancer (e.g., as a repeater)

§ 973.09(2)(b)
St v Wicks
168 Wis. 2d 703
(Ct. App. 1992)

a. If a felony, conviction of a penalty enhancer increases the maximum length of probation by an amount equal to the maximum length of the penalty enhancer

See § 973.09(2)(a)

b. If a misdemeanor, conviction of a penalty enhancer does not increase the maximum length of probation

4) May be consecutive to sentence of confinement

St v Gereaux
114 Wis. 2d 110
(Ct. App. 1983)

a. May not be consecutive to another term of probation

b. Ct may impose concurrent probation of greater length than prison sentence to avoid gap caused by revocation of parole before MR

St v Aytch
154 Wis. 2d 508
(Ct. App. 1990)

5) May be imposed concurrently with a prison term

§ 973.09(3)(a)
Huggett v St
83 Wis. 2d 790 (1978)

6) Ct may extend probation for cause and modify conditions before expiration

St ex rel Taylor v Linse
161 Wis. 2d 719
(Ct. App. 1991)

a. Ct may modify Ct-ordered and DOC-imposed conditions of probation

St v Gray
225 Wis. 2d 39 (1999)

b. Probation may also be modified before it begins

St v Luu
2009 WI App 91
319 Wis. 2d 778

c. Extension may exceed original limit

§ 973.09(3)(c)

7) Causes for extension of probation

a. Def has not made good-faith effort to discharge Ct-ordered payment obligations

b. Def cannot presently pay restitution and Def and person owed consent to community service in satisfaction of restitution ordered

c. Def stipulates to extension and Ct finds extension would serve purposes for which probation imposed

St v Davis
127 Wis. 2d 486 (1986)
St v Jackson
128 Wis. 2d 356 (1986)

8) Caution should be used in considering extension of probation for failure to pay full restitution; must consider Def's ability to pay

St v Dowdy
2010 WI App 158
330 Wis. 2d 444
aff'd, 2012 WI 12
338 Wis. 2d 565

9) Sec. 973.09(3)(a) does not grant Ct authority to reduce length of probation originally imposed

St ex rel Greer v Wiedenhoeft
2014 WI 19
353 Wis. 2d 307

10) Erroneous discharge certificate does not end probation

D. Conditions of probation

St v Kennedy
190 Wis. 2d 252
(Ct. App. 1994)
St v Hufford
186 Wis. 2d 461
(Ct. App. 1994)

1) Restitution

§ 973.09(4)

2) Confinement in Cty jail for not more than 1 year

St v Avila
192 Wis. 2d 870 (1995)
St v McClinton
195 Wis. 2d 344
(Ct. App. 1995)

a. Pretrial confinement as a result of inability to post cash bond not to be credited against jail time imposed as condition of probation

b. Time spent in prison before withdrawal of plea not to be credited against jail time imposed as condition of probation

St v Johnson
2005 WI App 202
287 Wis. 2d 313

c. Jail time as condition of probation in case A may be consecutive to same in case B *if* convictions at different times

St v Fearing
2000 WI App 229
239 Wis. 2d 105

3) Ct cannot permit probation agent to decide if period of confinement should be imposed

§ 973.09(7m)

4) Community service performed for public agency or nonprofit charitable organization

a. Hours may not exceed what would be reasonable given seriousness of offense and read-ins

b. Order for community service must be agreed to by Def and agency

§ 973.09(7m)(a)

c. Def reduces period of jail as condition of probation at rate of 1 day for each 3 days' work performed (8 hours of work per day)

§ 973.09(1g)

5) Payment of Atty fees and Ct costs

§ 973.09(1)(a)
see ABA Stds—
Sentencing § 18-3.13(d)
(1994)

6) Ct may also impose conditions that appear to be reasonable and appropriate, such as the following:

a. Cooperation with program of supervision

b. Meeting family responsibilities

c. Employment

d. Educational and vocational training

e. Medical or psychiatric treatment

f. Maintaining residence in prescribed area or special facility

g. Compliance with substance abuse treatment

St v Davis
2017 WI App 55
377 Wis. 2d 678

h. Sobriety

Ramaker v St
73 Wis. 2d 563 (1976)
St v Simonetto
2000 WI App 17
232 Wis. 2d 315

i. Prohibiting association with certain types of people or frequenting certain types of places

St v Carrizales
191 Wis. 2d 85
(Ct. App. 1995)

j. Requirement of admission of guilt as condition of treatment

St v Stewart
2006 WI App 67
291 Wis. 2d 480
St v Nienhardt

196 Wis. 2d 161
(Ct. App. 1995)

k. Geographical limits related to rehabilitation and protection of victims

St ex rel Kaminski v Schwarz
2001 WI 94
245 Wis. 2d 310

l. Requirement of reporting sex offender status to neighbors

§ 973.049

m. Ct may order no contact with any victim, witness, or co-actor

§ 973.049(3)

- In any case with a no-contact condition under § 973.049, Ct must include the prohibition in the judgment of conviction

St v King
2020 WI App 66
394 Wis. 2d 431

n. Restrict use of internet with specific conditions

§ 973.09(3)(a)
St v Williams-Holmes
2023 WI 49
408 Wis. 2d 1
St v Gray
225 Wis. 2d 39, 66–69
(1999)

7) Ct may order review hearing to monitor Def's compliance with conditions and may modify conditions, including imposing jail time *and lifting no-contact restrictions*, only by following statutory modification process

St v Migliorino
150 Wis. 2d 513 (1989)

8) Def can refuse probation if finds conditions of probation more onerous than the sentence

§ 973.09(1)(a)
St v Rowan
2012 WI 60
341 Wis. 2d 281
see also Samson v Calif
126 SCt 2193 (2006)
St v Oakley
2001 WI 103
245 Wis. 2d 447

9) Conditions of probation may impinge on constitutional rights as long as the conditions are not overly broad and are reasonably related to the person's rehabilitation

St v Oakley
2000 WI 37
234 Wis. 2d 528

a. May not include payment of fines due in other cases, if violation of condition exposes Def to incarceration in Cty jail for more than 6 months

St v Hoppe
2014 WI App 51
354 Wis. 2d 219

10) "No drive" condition may not exceed maximum period of revocation under Ch 343

§ 973.09(1)(d)
St v De Leon
171 Wis. 2d 200
(Ct. App. 1992)

11) Ct may place Def on probation when offense provides a mandatory or presumptive minimum period of one year or less of imprisonment, but must as a condition of probation, require that Def be confined for at least that mandatory or presumptive minimum period

St v McClinton
195 Wis. 2d 344
(Ct. App. 1995)

a. Def who receives conditional jail time equal to minimum mandatory sentence is entitled to good time credit

Prue v St
63 Wis. 2d 109 (1974)

b. Otherwise, good time for probation confinement within Ct's discretion

St v Oakley
2001 WI 103
245 Wis. 2d 447
St v Koenig
2003 WI App 12
259 Wis. 2d 833
Von Arx v Schwarz
185 Wis. 2d 645
(Ct. App. 1994)

12) Relevant condition may impinge on religious freedom, right to procreate, or social life

5. Electronic Monitoring

§ 302.425
St v Galecke
2005 WI App 172
285 Wis. 2d 691
St v Schell
2003 WI App 78
261 Wis. 2d 841

A. Sheriff may place prisoner on electronic monitoring equipment if available. Violation of separation of powers for Ct to prohibit electronic monitoring by sheriff

B. May also be used as condition of probation

St v Eastman
220 Wis. 2d 330
(Ct. App. 1998)

C. Electronic monitoring cannot be ordered by Ct in cases specifying mandatory minimum imprisonment

6. Confinement

Bastian v St
54 Wis. 2d 240 (1972)
St v Gallion
2004 WI 42, ¶ 25

270 Wis. 2d 535
see also ABA Stds—
Sentencing § 18-6.4
(1994)

A. Criteria: Probation to be disposition, unless

1) Confinement necessary to protect public from further criminal activity of Def

2) Offender needs correctional treatment available only if confined (community rehabilitation services exhausted)

3) Undue depreciation of seriousness of crime if probation granted

St v Maron
214 Wis. 2d 384
(Ct. App. 1997)

4) Violation to impose sentence consecutive to probation or consecutive to jail time as condition of probation

§ 973.02

B. Where imprisoned if not specified by statute

1) Cty jail, if sentence less than 1 year

2) State prison, if sentence more than 1 year

3) Either Cty jail or State prison, if sentence 1 year

§ 973.03(2)

4) All time to be served in State prison, if sentenced to State prison and Cty jail or House of Correction on separate offenses

C. Parole eligibility

§ 973.014(1)(b)
St v Ambrose
181 Wis. 2d 234
(Ct. App. 1993)

1) Trial Ct may set parole eligibility date on 1st-degree intentional homicide

a. § 973.014(2) (now § 973.014(1)(b)) is constitutional

§ 973.014
St v Setagord
187 Wis. 2d 340
(Ct. App. 1994)

b. But Ct may not sentence Def to life without setting parole eligibility date

§ 973.014(1)(c)

- Unless offense committed 8/31/95 through 12/31/99

St v Setagord
211 Wis. 2d 397 (1997)

2) Ct may set parole eligibility date to occur after Def's life expectancy

St v Whiteside
205 Wis. 2d 685
(Ct. App. 1996)

3) In other cases, not improper exercise of discretion for Ct in appropriate case to recommend Def not be granted parole

D. Cty jail sentences

1) Confinement may be full time, or

§ 303.08
St v Ogden
199 Wis. 2d 566 (1996)

2) May grant "Huber law" privileges at time of sentencing or later on petition

§ 303.08(1)

a. Privilege of leaving jail during necessary and reasonable hours to seek employment, work, perform community service, conduct self-employment occupation, including housekeeping and attending needs of family, attending Ct proceedings in which Def is party or is subpoenaed as witness, attending school, obtaining medical treatment (including mental health counseling or therapy), attending parenting education program, or meeting with probation or parole officer

§ 303.08(10r)

b. If Def sentenced to jail subject to ignition interlock device (IID) order, may not be released unless, within 2 weeks after issuance of IID order, Def submits proof to sheriff that IID has been installed in each vehicle applicable to order

§ 973.03(3)

3) May order Def to perform community service work

§ 973.03(4)

4) May order, in lieu of imprisonment in Cty jail, Def to be detained at his/her place of residence and monitored by electronic surveillance

7. Sex Offender Registry

§ 973.048(2m)

A. Compliance with reporting under § 301.45 required

§ 940.22(2)

1) Sexual contact by therapist

§ 940.225(1), (2), or (3)

2) 1st-, 2nd-, or 3rd-degree sexual assault

§ 944.06

3) Incest

§ 948.02(1), (2)
§ 948.025

4) 1st-, 2nd-, or 3rd-degree sexual assault of child or repeated sexual assault of same child

§ 948.05
§ 948.051

5) Sexual exploitation or trafficking of child

§ 948.055

6) Causing child to view or listen to sexual activity

§ 948.06

7) Incest with child

§ 948.07

8) Child enticement

§ 948.075

9) Using computer to facilitate child sex crime

§ 948.08

10) Soliciting child for prostitution

§ 948.085

11) Sexual assault of child in substitute care

§ 948.095

12) Sexual assault of child by school staff or volunteer

§ 948.11(2)(a) or (am)

13) Exposing child to harmful materials

§ 948.12

14) Possession of child pornography

§ 948.13

15) Child sex offender working with children

§ 948.30

16) Abduction of another's child

§ 940.302(2)(a)1.b.

17) Human trafficking for purpose of commercial sex act

§ 940.30
§ 940.31

18) False imprisonment or kidnapping of minor who is not Def's child

§ 301.45(5)(b)1.
St v Rector
2023 WI 41
407 Wis. 2d 321

B. Multiple convictions from a single complaint and pled to in a single hearing constitute one "occasion" and do not require "lifetime sex offender registration"

§ 301.45(1m)

C. Compliance may be excused by Ct if Def was less than 19 years old and offense was nonforcible sexual assault with victim who was less than 4 years younger or less than 4 years older than Def

§ 973.048(1m)

D. If Ct finds conduct sexually motivated (§ 980.01(5)) and registration is in interest of public protection, compliance with reporting under § 301.45 may be required for violations of:

1) Ch 940

2) Ch 944

3) Ch 948

4) § 942.08

5) § 942.09 (Ct may order special disposition under § 973.048(1m)(b) for Def under 21 years old who has successfully completed sentence or probation)

6) §§ 943.01–943.15

St v Martel
2003 WI 70
262 Wis. 2d 483
St v Jackson
2012 WI App 76
343 Wis. 2d 602

E. Def must be convicted of qualifying offense. Dismissed or read-in offenses, by themselves, do not qualify

§ 301.45(2)(a)6m.
St v Jackson
2020 WI App 4
390 Wis. 2d 402

F. Required reporting by Def of all email accounts, blogs, or websites every year or within 10 days after changes does NOT violate 1st Amendment

§ 301.47(2)(a)
St v CG (Int of CG)
2022 WI 60
403 Wis. 2d 229

G. Prohibiting name change of Def, even if gender is changing, does NOT violate 1st Amendment

CR 39: MODIFICATION OF SENTENCE/ RESENTENCING

1. Time Constraints for Motion to Modify Sentence

A. Motion under § 973.19

§ 973.19

1) Within 90 days after sentencing as matter of right

St v Nickel
2010 WI App 161
330 Wis. 2d 750

a. Applies to DNA surcharges

2) Mutually exclusive remedy to appeal or pursue postconviction remedies pursuant to § 809.30(2)

3) Decision must be made within 90 days

a. Ct may extend time for decision up to 90 days for cause

4) If decision not timely made

a. Motion deemed denied and clerk must immediately enter order denying motion

St v Scherreiks
153 Wis. 2d 510
(Ct. App. 1989)

b. Ct lacks competency to enter order denying motion for modification after time for deciding motion has expired

Hayes v St
46 Wis. 2d 93 (1970)
overruled on
other grounds by
St v Taylor
60 Wis. 2d 506 (1973)

B. Ct has inherent power to amend, modify, and correct sentence within time limits set by statute or case law

St v Hungerford
76 Wis. 2d 171, 178
(1977)
St ex rel Copas v Burke
28 Wis. 2d 188 (1965)

1) Trial Ct has inherent power to correct certain sentencing errors at any time

St v Martin
121 Wis. 2d 670 (1985)

2) Sentencing errors subject to correction include

a. Formal or clerical errors

St v Prihoda
2000 WI 123
239 Wis. 2d 244

- Must be corrected by Ct, not clerk

b. Illegal sentences

§ 973.13

c. Sentences in excess of lawful maximum

Rosado v St
70 Wis. 2d 280 (1975)

d. Sentences based on impermissible factors

St v Borst
181 Wis. 2d 118
(Ct. App. 1994)

e. Failure to impose restitution

3) Limitations

St v Gruetzmacher
2004 WI 55
271 Wis. 2d 585
St v North
91 Wis. 2d 507
(Ct. App. 1979)

a. Ct may not increase valid sentence if Def has legitimate expectation of finality

b. Ct has no inherent power to stay sentence, except to give effect to an appeal

§ 973.09(3)(a), (d)
St v Schwind
2019 WI 48
386 Wis. 2d 526

c. Ct has no inherent authority to terminate or reduce length of probation originally imposed

2. Motions Filed After Time Expires

Cresci v St
89 Wis. 2d 495 (1979)
Krueger v St
86 Wis. 2d 435 (1979)
Klimas v St
75 Wis. 2d 244, 246
(1977)
Kutchera v St
69 Wis. 2d 534 (1975)

A. Statutory time constraints are regulatory, not jurisdictional

B. Ct has discretion to consider motion filed after statutory time constraints expire

Jones v St
70 Wis. 2d 62,72 (1975)

1) Ct must receive good reason for Def's delay in bringing motion

St v Hungerford
76 Wis. 2d 171 (1977)

2) Ct should consider motion if compelling circumstances exist for not bringing motion within required period

St v Noll
2002 WI App 273
258 Wis. 2d 573

C. Two time limits for filing motion for modification

1) Sec. 973.19(1)(a)—90 days after sentence imposed

§ 973.19(5)

a. Waives other relief

b. Filed if no other appeal being pursued

§ 809.30(2)(h)

2) Sec. 973.19(1)(b)—60 days after later of service of transcript or Circuit Ct case record

a. If other appellate issues pending

St v Nickel
2010 WI App 161
330 Wis. 2d 750

3) Time limits apply to postconviction motions attacking DNA surcharge

3. Grounds for Motion to Modify Sentence

St v Franklin
148 Wis. 2d 1 (1989)

A. General standards

1) Two-step procedure

a. Def must show new factor

- Burden of proof on Def by clear and convincing evidence

St v Harbor
2011 WI 28, ¶ 33
333 Wis. 2d 53

- Whether set of facts is "new factor" is question of law

b. If so, Ct determines whether new factor justifies modification of sentence

St v Harbor
2011 WI 28, ¶ 33
333 Wis. 2d 53

- Whether new factor warrants modification of sentence rests within Ct's discretion

St v Verstoppen
185 Wis. 2d 728

(Ct. App. 1994)

- Acquittal of charges that caused probation revocation and imposition of withheld sentence does not require Ct to modify sentence imposed

B. "New factor" defined

St v Harbor
2011 WI 28, ¶ 40
333 Wis. 2d 53
St v Hegwood
113 Wis. 2d 544, 546
(1983)
Cresci v St
89 Wis. 2d 495 (1979)
Rosado v St
70 Wis. 2d 280, 288
(1975)

1) Refers to fact or set of facts highly relevant to imposition of sentence, but not known to Trial Judge at time of original sentencing, because

a. Factor not then in existence, or

b. Factor in existence, but unknowingly overlooked by all parties

St v Franklin
148 Wis. 2d 1 (1989)

c. If Ct relies on particular factor that later changes, Ct has power to protect own decree by modifying sentence

2) Proper new factors

Hayes v St
46 Wis. 2d 93 (1970)
overruled on
other grounds by
60 Wis. 2d 506, 523
(1973)

a. Ct finding it had been misinformed as to Def's past criminal record

St v Smet
186 Wis. 2d 24
(Ct. App. 1994)

- Mistake in sentencing guideline score attached to PSI (but not a mandate for modification)

St v Sepulveda
119 Wis. 2d 546 (1984)

b. Denial of Def's admission to mental hospital when admission imposed as condition of probation

St v Ralph
156 Wis. 2d 433
(Ct. App. 1990)

c. New information about accomplice's sentence

St v Verstoppen
185 Wis. 2d 728
(Ct. App. 1994)

d. Acquittal of charges that resulted in revocation of probation and imposition of withheld sentence

St v Boyden
2012 WI App 38
340 Wis. 2d 155
St v Doe
2005 WI App 68
280 Wis. 2d 731

e. Assistance to law enforcement if, for example, the fruits of the assistance are not known until after sentencing

3) Not new factors

St v Hegwood
113 Wis. 2d 544, 547–48
(1983)
Moore v St
83 Wis. 2d 285, 310
(1978)

a. Legislative reduction of statutory maximum sentence, unless

§ 990.04

- Prior criminal liability specifically and expressly remitted or abrogated by repealing statute

b. Prison record of progress

St v Machner
101 Wis. 2d 79, 82 (1981)
St v Champion
2002 WI App 267
258 Wis. 2d 781
St v Prince
147 Wis. 2d 134
(Ct. App. 1988)

- Rehabilitative progress in penal system related only to paroles and pardons and not to Ct's modification of sentence, even if sentence imposed under truth-in-sentencing legislation

St v Kluck
210 Wis. 2d 1 (1997)

- Post-sentence conduct while out on bail pending appeal not new factor

St v Harris
174 Wis. 2d 367
(Ct. App. 1993)
St v Prince
147 Wis. 2d 134
(Ct. App. 1988)

c. Def's change in attitude that increases chances for rehabilitation

St v Johnson
158 Wis. 2d 458
(Ct. App. 1990)

d. Change of heart of victim regarding proper punishment for Def

e. Change of heart of Judge upon reflection or after second thoughts

St v Machner
101 Wis. 2d 79 (1981)

f. Medical or special treatment needs

St v Gibbons
71 Wis. 2d 94, 98 (1976)
St v Lynch
105 Wis. 2d 164, 168–69
(Ct. App. 1981)

- Sentencing Ct has no jurisdiction to place conditions on prison sentence, or to order specific treatment such as psychiatric or psychological treatment

- Control over care of prisoners vested in DOC by § 301.03(2)

- Although prisoner entitled to treatment for "serious medical need," not a concern of Trial Judge at sentencing, rather a concern of custodial agency

St v Schladweiler
2009 WI App 177
322 Wis. 2d 642

g. DOC denial of bootcamp previously approved by Ct

St v Slagoski
2001 WI App 112
244 Wis. 2d 49

h. Postconviction expert opinion inconsistent with opinions rendered before conviction

St v Ninham
2011 WI 33, ¶¶ 87–93,
333 Wis. 2d 335
St v McDermott
2012 WI App 14, ¶¶ 16–
22, 339 Wis. 2d 316

i. Research on adolescent brain development

St v Sobonya
2015 WI App 86
365 Wis. 2d 559

j. Expert opinion based on known facts

See St v Arberry
2018 WI 7, ¶ 16 & n8
379 Wis. 2d 254

k. Failure to raise expunction at sentencing

St v Vesper
2018 WI App 31, ¶¶ 39–
41, 382 Wis. 2d 207

l. Duplicated sentence credit

St v Vesper
2018 WI App 31, ¶ 42
382 Wis. 2d 207

m. Reconfinement on a separate case

4. Standards of Review

Cresci v St
89 Wis. 2d 495, 504
(1979)
St v Wuensch
69 Wis. 2d 467 (1975)

A. On review of sentence previously imposed, Trial Ct should determine whether

1) Sentence unduly harsh and unconscionable, or

2) Sentence constituted erroneous exercise of discretion

St v CVC
153 Wis. 2d 145
(Ct. App. 1989)

a. Sentence excessive and unusual

b. Sentence so disproportionate to offense as to shock public sentiment and violate judgment of reasonable people regarding what is right and proper under circumstances

St v Wuensch
69 Wis. 2d 467, 478
(1975)

B. Ct may reduce sentence on basis that sentence constituted erroneous exercise of discretion

St v Magnuson
220 Wis. 2d 468
(Ct. App. 1998)

C. Judicial estoppel may bar Def from arguing that sentence Def agreed to is now excessive

St v Wuensch
69 Wis. 2d 467, 480
(1975)

D. Ct must state adequate grounds for finding sentence harsh and unconscionable

St v Ralph
156 Wis. 2d 433
(Ct. App. 1990)

1) Disparate sentence from similarly situated co-Def can support reduction on grounds of undue harshness or unconscionability

St v Babler
170 Wis. 2d 210
(Ct. App. 1992)

E. Eighth Amendment does not require strict proportionality between crime and sentence

1) Only forbids extreme sentences that are grossly disproportionate to the crime

5. Resentencing

St v Walker
117 Wis. 2d 579 (1984)

A. Appropriate when original sentence legally impermissible, unlawful, or not in accord with law

St v Holloway
202 Wis. 2d 694
(Ct. App. 1996)

1) When repeater component of sentence wrongly imposed is commuted, Ct may resentence if premise and goals of commuted sentence have been frustrated

St v Finley
2016 WI 63
370 Wis. 2d 402

2) But resentencing not remedy for incorrectly advising Def of maximum

St v Coffee
2020 WI 1
389 Wis. 2d 627
St v Travis
2013 WI 38
347 Wis. 2d 142
St v Tiepelman
2006 WI 66
291 Wis. 2d 179

B. Resentencing appropriate when Ct actually relied on inaccurate or improper information unless State proves error was harmless

St v Marcotte
2020 WI App 28
392 Wis. 2d 183
St v Goodson
2009 WI App 107
320 Wis. 2d 166

C. Resentencing appropriate when Def proves objective bias of sentencing Judge

St v Weigel
2022 WI App 48
404 Wis. 2d 488

D. Resentencing required when State's breach of plea agreement is material and substantial

St v Toliver
187 Wis. 2d 346
(Ct. App. 1994)

E. Not required when State fails to follow plea agreement that Def breached first

North Carolina v Pearce
89 SCt 2072 (1969)
St v Stubbendick
110 Wis. 2d 693, 697
(1983)

F. Ct must state reasons for modification of sentence

St v Wuensch
69 Wis. 2d 467, 480
(1975)

G. No sentence modification appropriate on mere reflection, when Ct reconsiders factors originally considered in imposing sentence

1) Unless Ct finds original sentence unduly harsh or unconscionable

St v Leonard
39 Wis. 2d 461 (1968)

2) Ct should distinguish between factors weighed in modifying sentence and factors weighed in original sentence

St v Robinson
2014 WI 35
354 Wis. 2d 351

H. May resentence when Ct promptly discovers its own error and acts before expectation of finality

St v Tarwid
147 Wis. 2d 95
(Ct. App. 1988)

I. Judge may impose more severe sentence only if justified by objective new factors

1) Objective identifiable factual data not known to Judge at original sentencing sufficient to overcome presumption of vindictiveness

2) Any leniency based on plea later withdrawn need not be extended at resentencing

3) More severe sentence may be based on knowledge obtained from intervening trial

St v Jones
2002 WI App 208
257 Wis. 2d 163

4) Sentence based on Def fraudulent representation may be voided and increased

St v Naydihor
2004 WI 43
270 Wis. 2d 585
St v Carter
208 Wis. 2d 142 (1997)

J. Ct may consider events and circumstances occurring since the original sentence

6. Sentencing Adjustment—Truth in Sentencing

NOTE: Sentences imposed before October 1, 2009, are treated differently than those imposed after October 1, 2009, per amendments made to § 973.195(1r) by 2009 Wis. Act 28.

NOTE: Between October 1, 2009, and August 3, 2011, inmates could earn positive adjustment time (PAT) under 2009 Wis. Act 28. The sentencing-related amendments in 2009 Wis. Act 28 were repealed by 2011 Wis. Act 38, effective August 3, 2011, but the provision of 2011 Wis. Act 38 that retroactively deprived an inmate of PAT that had been earned between October 1, 2009, and August 3, 2011, was ruled as an unconstitutional ex post facto law in *St ex rel Singh v Kemper*, 2016 WI 67, 371 Wis. 2d 127. An inmate who was eligible to earn PAT between October 1, 2009, and August 3, 2011, may again apply for early release. *See* Wis. Stat. § 973.198.

§ 973.195(1r)(a)
St v Anderson
2015 WI App 92
366 Wis. 2d 147

A. Available for Class C to I felonies and enhanced misdemeanors only

1) If multiple sentences, treat each individually

B. Time limits

§ 973.195(1g), (1r)(a)

1) Class C to E felonies—may apply after serving 85% of period of confinement

2) Class F to I felonies and enhanced misdemeanors—may apply after serving 75% of period of confinement

C. Grounds

§ 973.195(1r)(b)1.

1) Conduct, efforts at, and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs

§ 973.195(1r)(b)3.

2) Change in law or procedure related to sentencing or revocation of extended supervision effective after inmate was sentenced that would have resulted in shorter term of confinement in prison or, if inmate was returned to prison upon revocation of extended supervision, shorter period of confinement in prison upon revocation, if change had been applicable when inmate was sentenced

§ 973.195(1r)(b)4.

3) Inmate is subject to sentence of confinement in another State or inmate is in US illegally and may be deported

§ 973.195(1r)(b)5.

4) Adjustment is otherwise in the interests of justice

D. Ct responsibilities

§ 973.195(1r)(c)

1) Upon receipt, deny or hold petition for modification of sentence

2) If petition held for further consideration, notify DA

§ 973.195(1r)(d)

3) If DA does not object within 10 days and if crime is sexual offense under §§ 940.225(2) or (3), 948.02(2), 948.08, or 948.085, DA must notify victim

§ 973.195(1r)(f)
St v Stenklyft
2005 WI 71
281 Wis. 2d 484

4) Caution: Statutory language allowing victim or DA to "veto" petition is unconstitutional. Even if DA or victim objects, Ct must determine whether sentence adjustment is in the public interest. Ct shall make written findings

E. Adjustment

§ 973.195(1r)(g)1. & 2.

1) Ct may reduce term of confinement by amount of time remaining in term of confinement, less up to 30 days, and correspondingly increase extended supervision

§ 973.195(1r)(h)1. & 2.

2) If adjustment granted based on change of law, extended supervision may be shortened to conform to new maximum

CR 40: MOTION FOR A NEW TRIAL

1. Time Constraints for Motion

§ 974.02
§ 809.30
§ 809.40

A. Chronology of time constraints

Action	Aggregate Days
Sentencing § 809.30(2)(b)	Day 1
Def to file Notice of Intent to pursue postconviction relief § 809.30(2)(c) § 809.30(2)(d)	Day 20
Clerk to send copies to appropriate parties; if Def requests SPD, DA may request indigency hearing** § 809.30(2)(e) § 809.30(2)(f)	Day 25
Transcript and Circuit Ct case record must be requested by Def***	Day 50
Transcript and Circuit Ct case record must be requested by SPD**** § 809.30(2)(g)	Day 56
Reporter must file transcript with Ct and serve (deliver) copies to Atty (party) and Clerk must serve copy of Circuit Ct case record on Atty (party) within 60 days. (Reporter shall file	Day 110 Day 116

with Circuit Ct transcript of postconviction hearing within 20 days after Def filing appeal or postconviction motion)	
§ 809.30(2)(h)	
Def to file notice of appeal or postconviction motion	Day 170
60 days after the later of service of transcript or Circuit Ct case record. Notice of motion may not be filed with postconviction motion	Day 176
§ 809.30(2)(i)	
Unless extension requested by Def or Circuit Ct and granted by Ct of Appeals, Circuit Ct has 60 days after motion filed to decide motion by order; if no order filed timely, Clerk shall immediately enter order denying motion	Day 230 Day 236

** If indigency hearing requested, add 20 days to subsequent calculations

*** If Def has been denied representation by SPD, **add 60 days here and to subsequent calculations**

****If Def represented by SPD, time runs from point at which SPD receives material from Clerk

§ 974.02
§ 809.30
§ 809.40

1) Chronology printed in chart reflects statutory limits of time constraints under § 809.30

2) Actual time constraints for any particular proceeding depend on dates of contacts, service, and filings contemplated in statutes

§ 809.30(2)(i)

B. Absolute time limit for decision

1) Decision made within 60 days after filing of motion

2) If decision not made within 60 days, motion deemed denied

Clerk must immediately enter order denying motion

2. Trial Court's Duty at Sentencing as to Postconviction Relief

§ 973.18(2)

A. At time of sentencing, Ct must advise convicted Def of right to pursue postconviction relief

RMC Form CR-233

B. Contents of Ct's instruction advising Def of postconviction rights

1) Def has right to appeal conviction

2) Def has right to file postconviction motions

3) Def must file notice of intent to pursue postconviction relief within 20 days after sentencing

Whitmore v St
56 Wis. 2d 706 (1973)

4) Def's trial counsel obligated to continue representation, until

a. Decision whether to file postconviction relief made, and

b. Appellate counsel appointed for Def

§ 973.18(3)

5) Def and counsel directed to sign form to be entered in record

6) Trial counsel has responsibility for filing notice of intent to pursue postconviction relief

a. See § 809.30(2)(b) for contents of notice of intent to pursue postconviction relief

- RMC Form CR-233 not notice of intent to pursue postconviction relief

§ 809.30(2)(h)

3. Appeal May Be Taken Without Filing of Postconviction Relief by Defendant

§ 974.02(2)

A. Def not required to file postconviction motion before appeal if grounds are

1) Sufficiency of evidence, or

2) Issues previously raised

St v Monje
109 Wis. 2d 138 (1982)

B. Failure to make postconviction motion may waive issues on appeal

4. Defendant's Right to Be Present at Motion Hearing

§ 971.04(1)(d)
St v Hatch
144 Wis. 2d 810
(Ct. App. 1988)

A. When substantial issues of fact of which Def has personal knowledge, Ct should require Def's production at evidentiary hearing

St v Vennemann
180 Wis. 2d 81 (1993)

1) 2-prong test

a. Are there substantial issues of fact as to events in which Def participated?

b. Are those issues supported by more than mere allegations?

St v Vennemann
180 Wis. 2d 81 (1993)
see also St v Soto
2012 WI 93
343 Wis. 2d 43

B. Presence by way of telephone may not satisfy statute

St v McDonald
144 Wis. 2d 531 (1988)

C. Death of Def during pendency of postconviction proceeding

1) Appeal not mooted

2) Criminal proceedings not abated *ab initio*

5. Issue of Competency Raised When Postconviction Relief Sought

See **CR 12**, **Sec. 10**, this volume

6. Standards of Review for Motion Based on Claim of Error

St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other
grounds by St v Wayerski
2019 WI 11
385 Wis. 2d 344

A. Sufficiency of evidence to convict

St v Johnson
108 Wis. 2d 703, 705
(Ct. App. 1982)

1) Whether Ct satisfied that jury acting reasonably could be convinced, beyond reasonable doubt, by evidence jury accepted as true

Issue not whether Ct convinced of Def's guilt

St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other
grounds by St v Wayerski
2019 WI 11
385 Wis. 2d 344

2) Ct should sustain verdict when any credible evidence in any reasonable view supports verdict of jury

St v Johnson
108 Wis. 2d 703, 705
(Ct. App. 1982)

Weight of evidence and credibility of witnesses for trier of facts

Baldwin v St
59 Wis. 2d 116, 121–22
(1973)
St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other
grounds by St v Wayerski
2019 WI 11
385 Wis. 2d 344

3) New trial warranted only when

a. Evidence considered most favorably to State so insufficient in probative value and force that, as matter of law, trier of fact could not be convinced beyond reasonable doubt

St v Daniels
117 Wis. 2d 9
(Ct. App. 1983)

b. Reasonable doubt

- Proof beyond reasonable doubt need not exclude every possible doubt

- Moral certitude must exist based on convincing reason, excluding all doubt as to existence of different conclusions also based on reason

St v Daniels
117 Wis. 2d 9, 17
(Ct. App. 1983)

c. Incredible evidence

- Reviewing Ct may overrule fact-finder only when fact-finder relied on inherently or patently incredible evidence

St v Williamson
84 Wis. 2d 370 (1978)
St v Bergenthal
47 Wis. 2d 668, 677
(1970)

B. Errors of law on admission of evidence

St v Harper
57 Wis. 2d 543 (1973)

1) Review of stipulations

Stipulation binding when Def and counsel understandingly and willingly stipulated to admission in evidence of certain stolen property Def possessed when arrested

St v Alsteen
108 Wis. 2d 723 (1982)

2) Review of Trial Ct discretion on admission of evidence

a. Issue is whether Trial Ct exercised discretion appropriately

b. Record must show

- Discretion exercised, and
- Trial Ct's basis for exercising discretion

c. Criteria to determine whether admission reasonable and proper

- Whether any statutory basis exists for admission (or exception) to rule of evidence
- Whether any resulting prejudice outweighs probative value
- Whether admitted evidence relevant to real issue in case

St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other
grounds by St v Wayerski
2019 WI 11
385 Wis. 2d 344

C. Errors of law in jury instructions

St v Clausen
105 Wis. 2d 231, 240–41
(1982)

1) General rule

a. Trial Ct has wide discretion to select and supplement jury instructions

b. Review of jury instructions must be on case-by-case basis

St v Williamson
84 Wis. 2d 370 (1978)

2) Ct should not grant new trial, when

a. Ct gives jury instructions free of error and adequately covering law applicable to facts, and

b. Ct rejects request for other jury instructions free of error and adequate

St v Dean
105 Wis. 2d 390
(Ct. App. 1981)

- When Def claims error caused by denial of requested instruction, evidence must be viewed in light most favorable to Def

St v Harp
150 Wis. 2d 861
(Ct. App. 1989)

3) After jury excused, Ct may not order new trial solely because of unobjected-to instruction errors

Ct retains right to order new trial in interest of justice

4) Entire charge to jury is viewed

Barrera v St
109 Wis. 2d 324 (1982)

a. Standard of review is whether reasonable juror could have interpreted particular questioned instruction as shifting burden of persuasion on particular element of offense to Def

St v Giwosky
109 Wis. 2d 446 (1982)

b. Disjunctive instruction may be permitted with respect to alternate means or ways a crime may be committed

c. Limits of unanimity

St v Giwosky
109 Wis. 2d 446 (1982)

- When continuous course of conduct examined, unanimity in battery verdict requires only that Def intentionally committed act that caused bodily harm

- Verdict does not require unanimity on which act caused the harm

§ 805.13(3)
St v Dean
105 Wis. 2d 390
(Ct. App. 1981)

5) Atty's failure to object to jury instructions usually waiver of defect

a. Ct may review jury instruction if substantial rights of Def affected

St v Shah
134 Wis. 2d 246 (1986)

b. Even if defect waived by Atty's failure to object, Appellate Ct may exercise discretion to review jury instructions that "go to integrity of fact-finding" process

Schenk v St
51 Wis. 2d 600 (1971)

6) Atty's failure to request jury instruction bars claim Ct erred in failing to so instruct

7) Harmless error in improper jury instructions

St v Fencl
109 Wis. 2d 224, 238
(1982)

a. Constitutional error harmless beyond a reasonable doubt, if no reasonable possibility error might have contributed to conviction

St v Nye
100 Wis. 2d 398
(Ct. App. 1981)

b. Improper jury instruction harmless error (as to purpose of sexual arousal) when evidence could not be construed as undertaken for any other purpose

Chapman v California
87 SCt 824 (1967)
Rudolph v St
78 Wis. 2d 435, 443
(1977)

c. Factors to determine whether constitutional error harmless

- Frequency of error
- Nature of State's evidence
- Nature of defense

St v Moriarty
107 Wis. 2d 622
(Ct. App. 1982)
St v Nye
100 Wis. 2d 398
(Ct. App. 1981)

d. Instructions that relieve State of proving every fact essential to crime not harmless

Roehl v St
77 Wis. 2d 398 (1977)
St v Kennedy
105 Wis. 2d 625
(Ct. App. 1981)

8) Admonitory instructions

Possible prejudice presumptively erased when admonitory instructions properly given by Ct

D. Error at prelim

St v Parr
182 Wis. 2d 349

(Ct. App. 1994)

Def who claims error occurred at prelim may only obtain relief before trial because error is cured by fair and errorless trial

St v Smith
125 Wis. 2d 11
(Ct. App. 1985), *rev'd*,
131 Wis. 2d 220 (1986)

7. Motion Based on Claim of Newly Discovered Evidence

A. To prevail on a claim of newly discovered evidence

St v McAlister
2018 WI 34, ¶ 31
380 Wis. 2d 684

1) Def must first prove by clear and convincing evidence that

a. Evidence was discovered after conviction

St v Watkins
2021 WI App 37
398 Wis. 2d 558

- Evidence must have existed before trial unless it resulted from developments in science and technology

b. Def was not negligent in seeking evidence

c. Evidence is material to an issue in the case, and

d. Evidence is not merely cumulative

St v McAlister
2018 WI 34, ¶ 33
380 Wis. 2d 684

2) If based on recantation, Def must show corroborating evidence consisting of

a. Feasible motive for initial false statement, and

b. Circumstantial guarantees of trustworthiness of recantation

Recommendation
St v Allen
2004 WI 106
274 Wis. 2d 568

3) Ct should review motion and determine whether each of these elements is sufficiently alleged before evidentiary hearing is required

B. If Def meets the burden, then

1) Ct must determine whether reasonable probability exists that different result would be reached in a trial

St v Avery
2013 WI 13
345 Wis. 2d 407
St v Plude
2008 WI 58
310 Wis. 2d 28
St v McCallum
208 Wis. 2d 463 (1997)
St v Edmunds
2008 WI App 33
308 Wis. 2d 374

2) Reasonable probability of a different outcome exists if there is a reasonable probability that a jury looking at the old and new evidence would have a reasonable doubt as to guilt

Vara v St
56 Wis. 2d 390 (1972)

C. Newly discovered evidence does not include newly discovered importance of evidence previously known and not used

St v Jackson
188 Wis. 2d 187
(Ct. App. 1994)

D. "Newly discovered evidence" should be distinguished from "newly available evidence" if it involves a co-Def's testimony and

1) Def aware of possible testimony before or at trial, and

2) Co-Def previously took the 5th

St v Avery
213 Wis. 2d 228
(Ct. App. 1997)

E. Burden of clear and convincing evidence rests with Def

Gelhaar v St
58 Wis. 2d 547 (1973)

8. Motion Based on Claim of Denial of Fair Trial

A. Improper remarks and questions of Attys

1) Trial fair if improper question stricken and Ct gives admonitory instruction to jury, provided

a. Question does not go to Def's guilt, and

b. Curative effect of Ct's admonition obviates possible prejudice, and

c. Strength of evidence of Def's guilt renders remark harmless beyond reasonable doubt

St v Williamson
84 Wis. 2d 370 (1978)

2) Prejudicial remarks of counsel or witnesses that do not go directly to issue of guilt must be considered in context of other facts of case, including

a. Curative effect of striking prejudicial remarks, and

b. Admonition to jury to disregard prejudicial remarks

St v Williamson
84 Wis. 2d 370 (1978)

3) Factual predicate

a. Failure of Atty to supply factual predicate to leading question of constitutional dimension only when

- Failure is prejudicial, and
- Failure denied Def fair trial

Doyle v Ohio
96 SCt 2240 (1976)
St v Fencl
109 Wis. 2d 224 (1982)

4) Comment on Def's silence

a. Constitutional error to refer to Def's pre-arrest and pretrial silence to imply Def's guilt

5) Atty's strategy

McCoy v Louisiana
138 SCt 1500 (2018)
St v Chambers
2021 WI 13
395 Wis. 2d 770

a. Decision whether to assert innocence to all charges and lesser included offenses is Def's alone

St v Tung
2023 WI App 33
408 Wis. 2d 544
pet for rev denied

Def must show Def expressly asserted objective to maintain innocence and Atty overrode objective by conceding guilt

St v Williamson
84 Wis. 2d 370 (1978)

b. Tainted remarks not error giving ground for new trial when counsel rejects Ct's offer to

- Strike tainted remarks

- Give curative instruction
- Permit remedial testimony

c. Failure to move to strike

- In determining motion for new trial, Ct may consider Atty's failure to move to strike in context of facts in case

B. Inadequate defense Atty

See **CR 41**, **Ineffective Assistance of Counsel**

Cuyler v Sullivan
100 SCt 1708 (1980)
St v Fencl
109 Wis. 2d 224 (1982)
St v Kaye
106 Wis. 2d 1 (1982)

C. Conflict of interest

1) Burden of proof on Def

2) Def must show by clear and convincing evidence that actual conflict of interest existed

Def need not demonstrate prejudice to obtain relief

D. Prejudicial pretrial publicity

St v Alfonsi
33 Wis. 2d 469 (1967)

1) Change of venue

a. Ct may be required to act sua sponte in some situations, when

- No request for delay of trial made, or
- No request for change of venue made

Schenk v St
51 Wis. 2d 600 (1971)

2) Prejudice must be shown in record

a. Prejudice does not appear in case when likelihood of unfairness not shown factually in record

Gelhaar v St
58 Wis. 2d 547 (1973)

E. Def's absence during some or all of trial proceedings

1) Bench and chamber conferences that exclude Def not violations of Def's constitutional or statutory right to be present during trial, provided that conferences dealt solely with

a. Questions of law

b. Matters of procedure

c. Matters of scheduling

Recommendation

2) During trial and jury deliberations, Def should be present at all meetings with counsel and jury

9. Postconviction Discovery

St v O'Brien
214 Wis. 2d 328,*aff'd*,
223 Wis. 2d 303 (1999)

A. To obtain postconviction discovery of physical evidence, Def must show that evidence sought is "consequential" to issue in case

"Consequential" evidence is evidence that creates reasonable probability of different trial outcome

St v Parker
2002 WI App 159
256 Wis. 2d 154
St v Noble
2001 WI App 145
246 Wis. 2d 533
rev'd on other grounds
2002 WI 64
253 Wis. 2d 206

B. Def's due-process rights are violated by posttrial destruction of evidence and new trial is required, if evidence destroyed was

1) Apparently exculpatory and of such a nature that Def would be unable to obtain comparable evidence by other reasonable means, or

2) Potentially exculpatory and was destroyed in bad faith

§ 752.35
Jones v St
70 Wis. 2d 41 (1975)

10. Granting New Trial in Interests of Justice

St v Henley
2010 WI 97
328 Wis. 2d 544

A. Ct has no "inherent authority" to grant a new trial

Garcia v St
73 Wis. 2d 651 (1976)
St v Cuyler
110 Wis. 2d 133 (1983)

B. New trial to be granted only when

1) Apparent miscarriage of justice, and

St v Larsen
141 Wis. 2d 412
(Ct. App. 1987)

It must appear that Def should not have been found guilty

St v Murdock
2000 WI App 170
238 Wis. 2d 301

2) Substantial probability that new trial will produce different result

St v Cuyler
110 Wis. 2d 133 (1983)
St v Davis
2011 WI App 147
337 Wis. 2d 688
St v Jeffrey AW
2010 WI App 29
323 Wis. 2d 541

C. Miscarriage of justice if real controversy not fully tried, such as

St v Ambuehl
145 Wis. 2d 343
(Ct. App. 1988)

1) When jury erroneously not permitted to hear important testimony

St v Bellows
218 Wis. 2d 614
(Ct. App. 1998)

2) When improperly admitted evidence so clouded crucial issue that real controversy not fully tried

3) When wrong instruction given, thereby preventing jury from adequately considering Def's claim

St v Harp
161 Wis. 2d 773
(Ct. App. 1991)

4) No showing of probable likelihood of different result at second trial required

St v Cuyler
110 Wis. 2d 133 (1983)

D. If credibility is crux of case, Ct must not erroneously exclude opinion evidence

11. Procedure When Transcripts Are Missing

St v Pope
2019 WI 106
389 Wis. 2d 390
St v Perry
136 Wis. 2d 92 (1987)

A. Def must make facially valid claim of arguably prejudicial error contained in the missing transcript

1) Need not show actual prejudice

2) Must at least claim a reviewable error occurred during the missing portion of the trial

B. If Def succeeds, Ct then makes discretionary determination whether record can be reconstructed

1) If possible, appellant bears burden to reconstruct

Ct must be convinced beyond a reasonable doubt that record has been properly reconstructed

2) If not possible, Ct must order a new trial

CR 41: INEFFECTIVE ASSISTANCE OF COUNSEL

McMann v Richardson
90 SCt 1441 (1970)

1. Constitutional Right to Counsel Means Effective Assistance of Counsel

Strickland v Washington
104 SCt 2052 (1984)

A. Benchmark: Whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced just result

Strickland v Washington
104 SCt 2052 (1984)
St v Pitsch
124 Wis. 2d 628 (1985)

B. Two-prong test: Deficient performance and prejudice

St v Curtis
218 Wis. 2d 550
(Ct. App. 1998)
St v Machner
92 Wis. 2d 797
(Ct. App. 1979)

1) Def must initiate *Machner* hearing in Trial Ct and show counsel's representation deficient, fell below objective standard of reasonableness

a. Def must identify deficient acts or omissions

St v Ambuehl
145 Wis. 2d 343
(Ct. App. 1988)

- ABA Standards for Criminal Justice are appropriate source of objective standards

St v Cooper
2019 WI 73
387 Wis. 2d 439

- Lawyer who violates professional conduct rules not necessarily ineffective

St v Foy
206 Wis. 2d 629
(Ct. App. 1996)

b. Ct must determine, based on all circumstances, whether act or omission outside range of professionally competent assistance

St v Maloney
2005 WI 74, ¶ 25
281 Wis. 2d 595

c. Judicial scrutiny of Atty performance highly deferential

- Avoid determinations of ineffectiveness based on hindsight

- Burden on Def to overcome strong presumption that counsel acted reasonably within professional norms

St v Swinson
2003 WI App 45
261 Wis. 2d 633
St v Randle
2002 WI App 116
252 Wis. 2d 743
St v Adams
221 Wis. 2d 1
(Ct. App. 1998)

d. Failure to raise issue of law is not deficient performance if Trial Ct later determines that legal issue is without merit

St v Hunt
2014 WI 102, ¶ 55
360 Wis. 2d 576

e. Strategic trial decision rationally based on facts and law is not ineffective assistance

St v Allen
2004 WI 106
274 Wis. 2d 568
St v McDougle
2013 WI App 43
347 Wis. 2d 302

f. Motion claiming ineffective assistance of counsel does not automatically trigger a right to a testimonial hearing. No hearing required if

St v Jackson
2023 WI 3
405 Wis. 2d 458

- Def fails to allege sufficient facts in motion to raise question of fact, or

St v Saunders
196 Wis. 2d 45
(Ct. App. 1995)

- Def presents only conclusory allegations or subjective opinion, or

St v Jeninga
2019 WI App 14
386 Wis. 2d 336

- Def fails to present objective facts about subjective decision to enter plea

St v Ruffin
2022 WI 34, ¶ 37
401 Wis. 2d 619
St v Bentley
201 Wis. 2d 303 (1996)

- Record conclusively demonstrates that Def not entitled to relief, even if motion alleges sufficient nonconclusory facts

St v Mayo
2007 WI 78
301 Wis. 2d 642
St v Sanchez
201 Wis. 2d 219 (1996)

2) Def must show prejudice to defense, so as to deprive Def of a fair trial with a reliable result

St v Hunt
2014 WI 102, ¶ 40
360 Wis. 2d576
St v Moffett
147 Wis. 2d 343 (1989)

a. Must affirmatively show reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different

St v Vinson
183 Wis. 2d 297
(Ct. App. 1994)

- Not every error that conceivably could have influenced outcome of case undermines reliability of result of proceedings

- Reasonable probability is one sufficient to undermine confidence in outcome

St v Stroik
2022 WI App 11
401 Wis. 2d 150

- Def need not prove different outcome definitively

St v Lindell
2001 WI 108
245 Wis. 2d 689
St v Teynor
141 Wis. 2d 187
(Ct. App. 1987)

- Prejudice not sufficient if effect of evidence minimal and did not affect outcome of trial

St v Moffett
147 Wis. 2d 343 (1989)

- Isolated trivial effect not enough

St v Damaske
212 Wis. 2d 169
(Ct. App. 1997)

- Def required to prove partiality or unfairness of Judge from record in case in which issue premised on untimely request for substitution of Judge

St v Sholar
2018 WI 53, ¶¶ 37–40
381 Wis. 2d 560

- Analysis of prejudice may be done on count-by-count basis; prejudice on one count does not necessarily undermine entire verdict

b. Ct must consider in light of totality of evidence before Judge or jury

Strickland v Washington
104 SCt 2052 (1984)
St v Smith
207 Wis. 2d 258 (1997)
St v Villarreal
2013 WI App 33
346 Wis. 2d 690

c. Prejudice presumed only if Def shows by clear and convincing evidence that Atty has conflict of interest or Atty failed to object to prosecutor's breach of plea agreement

St v Knox
213 Wis. 2d 318
(Ct. App. 1997)

- Inadvertent, promptly rectified misstatement of plea agreement by prosecutor may not constitute a substantial breach or due-process violation and Def not entitled to new sentencing

St v Erickson
227 Wis. 2d 758 (1999)

d. Presumption of prejudice and automatic reversal do not apply to situation in which error leaves Def with legally insufficient juror strikes, but number of peremptory strikes is not less than strikes available to prosecutor

St v Voss
205 Wis. 2d 586
(Ct. App. 1996)

e. No prejudice if sentence would not change even with allegation that trial counsel failed to object to sentencing information and present witnesses at sentencing

St v Anderson
222 Wis. 2d 403
(Ct. App. 1998)

f. Failure to seek adjournment to review and correct PSI, coupled with DA and Ct reliance on information is deficient performance and prejudicial, requiring a new sentencing

St v Fritz
212 Wis. 2d 284
(Ct. App. 1997)

g. Def must prove s/he would have accepted plea bargain but for deficient performance

C. Procedure

St v Machner
92 Wis. 2d 797
(Ct. App. 1979)

1) Trial counsel must be called to testify concerning reasons behind actions taken

St v Bonds
161 Wis. 2d 605
(Ct. App.)
rev'd on other grounds
165 Wis. 2d 27 (1991)

a. Ct to determine whether Atty's actions result of deliberate trial strategies or incompetence

St v Lukasik
115 Wis. 2d 134, 140
(Ct. App. 1983)

b. If trial counsel dead, insane, or unavailable, allegations of ineffectiveness must be corroborated. Def cannot rebut presumption of effectiveness by own words

St v Mosley
201 Wis. 2d 36
(Ct. App. 1996)

c. Failure to procure attendance of Def's trial Atty waives claim of ineffective counsel

St v Simpson
200 Wis. 2d 798
(Ct. App. 1996)

d. Def's trial Atty may testify even if direct criticism of trial counsel is withdrawn

§ 905.03(4)(c)
St v Flores
170 Wis. 2d 272, 277–78
(Ct. App. 1992)

e. Lawyer-client privilege waived when Def alleges ineffective assistance of counsel

St v Vennemann
180 Wis. 2d 81 (1993)
St v Saunders
196 Wis. 2d 45
(Ct. App. 1995)

2) Def has right to be present at evidentiary hearing unless Def did not participate in event that is the subject matter of the factual dispute in the hearing

Strickland v Washington
104 SCt 2052 (1984)
St v Foy
206 Wis. 2d 629
(Ct. App. 1996)

3) Ct may decide lack of prejudice first without determining deficiency of performance of counsel

St v Schultz
148 Wis. 2d 370
(Ct. App. 1988), *aff'd,*
152 Wis. 2d 408 (1989)

a. Ct should proceed directly to issue of prejudice, if easier

Kimmelman v Morrison
106 SCt 2574 (1986)

4) When ineffective counsel claim based on omission (e.g., failure to move for suppression of physical evidence), procedure to determine prejudice is

St v Jones
181 Wis. 2d 194
(Ct. App. 1993)

a. Hold omitted hearing

- In example above, State has burden to show reasonableness of search at suppression hearing
- Def then has burden to show that exclusion of tainted evidence would probably have led to different result

5) Defense may be required to provide expert testimony as to objective standard of reasonableness relative to claimed deficiency

D. Remedies

1) Normal remedy is to restore Def to stage in proceedings before acts of ineffectiveness by counsel

St v Smith
207 Wis. 2d 258 (1997)

a. Error at sentencing entitles Def to a new sentencing hearing before a new judge

St v Lentowski
212 Wis. 2d 849
(Ct. App. 1997)

b. Pretrial error affecting guilty plea vacates plea and sentence and entitles Def to new trial

St v Fritz
212 Wis. 2d 284
(Ct. App. 1997)

c. Remedy normally will not require prosecutor to reinstate original guilty plea offer

St v Felton
110 Wis. 2d 485 (1983)
St v Lettice
205 Wis. 2d 347
(Ct. App. 1996)

d. Trial error entitles Def to new trial

2. Specific Areas of Attorney Performance

St v Ambuehl
145 Wis. 2d 343
(Ct. App. 1988)

A. ABA Standards are appropriate source of objective standards

St v Pico
2018 WI 66, ¶¶ 40–47
382 Wis. 2d 273

1) Expert testimony not admissible to show trial counsel performed effectively

B. Discovery and investigation

Strickland v Washington
104 SCt 2052 (1984)

1) Counsel has duty to make reasonable investigations or to make reasonable decision that makes particular investigations unnecessary

2) Ineffective assistance when counsel

Kimmelman v Morrison
106 SCt 2574 (1986)

a. Fails to conduct discovery that would have prompted suppression motion of bedsheet in rape prosecution

St v Thiel
2003 WI 111
264 Wis. 2d 571

b. Fails to review discovery

St v Pitsch
124 Wis. 2d 628 (1985)

c. Fails to ascertain precise number of prior convictions of Def

St v Felton
110 Wis. 2d 485 (1983)
St v Byrge
225 Wis. 2d 702
(Ct. App. 1999)
aff'd on other grounds
2000 WI 101
237 Wis. 2d 197

d. Abandons NGI defense based on inadequate investigation, unless Def acts contrary to Atty's advice

St v Hicks
195 Wis. 2d 620
(Ct. App. 1995)
aff'd on other grounds
202 Wis. 2d 150 (1996)

e. Fails to initiate DNA test of potential evidence

St v Stroik
2022 WI App 11
401 Wis. 2d 150

f. Fails to investigate child sexual assault victim's prior recanted allegations of sexual assault

St v Schultz
148 Wis. 2d 370
(Ct. App. 1988). *aff'd,*
152 Wis. 2d 408 (1989)

3) Failure to investigate Def's story not deficient when Atty makes reasonable judgment that Def's story not related to critical factors in trial

C. Knowledge of applicable law

St v Felton
110 Wis. 2d 485 (1983)
St v Hubert
181 Wis. 2d 333
(Ct. App. 1993)

1) Prudent lawyer must be skilled and versed in criminal law but excused from knowing every isolated area of law

St v Harris
133 Wis. 2d 74
(Ct. App. 1986)

2) Counsel afforded reasonable exercise of judgment falling within wide range of professionally competent assistance

St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

3) Ineffective assistance of counsel limited to situations in which law or duty clear, such that reasonable counsel should know enough to raise the issue

4) Ineffective assistance when counsel

St v Pitsch
124 Wis. 2d 628 (1985)

a. Lacks knowledge of procedure for impeachment of Def by prior convictions

St v Felton
110 Wis. 2d 485 (1983)

b. Lacks knowledge of heat-of-passion manslaughter

St v Lentowski
212 Wis. 2d 849
(Ct. App. 1997)

c. Recommends trial rather than guilty plea to Def based on invalid defenses

Arrowood v Clusen
732 F2d 1364
(7th Cir 1984)
St v Nicholson
187 Wis. 2d 688
(Ct. App. 1994)

d. Fails to request proper jury instruction on trustworthiness of confessions, when defense theory involves challenge to credibility of Def's confession unless action is legitimate tactical decision of counsel

St v Dillard
2014 WI 123
358 Wis. 2d 543

e. Fails to know and correctly advise Def of the applicability of the persistent repeater enhancer

St v Mader
2023 WI App 35
408 Wis. 2d 632
pet for rev denied

f. Fails to object to expert testimony that provides a mathematical statement approaching certainty that false reporting does not occur

5) Not necessarily deficient performance when counsel

St v Veach
2002 WI 110
255 Wis. 2d 390

a. Lacks knowledge of potential availability and benefits of client's admission or stipulation to elements of crime

St v Cleveland
2000 WI App 142
237 Wis. 2d 558

- Atty's failure to stipulate to evidence at heart of trial issue is not deficient

St v Carter
2010 WI 40
324 Wis. 2d 640

b. Failed to introduce evidence that child victim was previously sexually assaulted

D. Adequacy of preparation/trial presentation

State v. Mull
2023 WI 26
406 Wis. 2d 491
St v Oswald
2000 WI App 2
232 Wis. 2d 62

1) Fact that counsel's pretrial or trial strategy is unsuccessful does not necessarily mean performance legally insufficient so long as strategy constitutes a genuine defense

St v Moffett
147 Wis. 2d 343 (1989)

2) Unintentional oversight in introducing evidence at trial is ineffectiveness if not product of reasoned deliberate defense strategy

St v Dunlap
2000 WI App 251
239 Wis. 2d 423
rev'd on other grounds
2002 WI 19
250 Wis. 2d 466

3) Failure to initiate critical pretrial motion may be deficient performance

St v Cleveland
118 Wis. 2d 615 (1984)

a. When only evidence of Def's guilt was fruit of no-knock search warrant, counsel ineffective for not moving to suppress

St v Jenkins
2014 WI 59
355 Wis. 2d 180
St v Eckert
203 Wis. 2d 497
(Ct. App. 1996)
St v Elm
201 Wis. 2d 452
(Ct. App. 1996)
St v Delgado

194 Wis. 2d 737
(Ct. App. 1995)

4) Failure to call critically important witness may be deficient performance by counsel, unless

a. Consistent with reasoned defense strategy

b. Witness's testimony would not be critical and would not have changed result of trial

St v Franklin
228 Wis. 2d 408
(Ct. App. 1999)

c. Def admits to counsel that testimony of potential witnesses would not be true

St v Tkacz
2002 WI App 281
258 Wis. 2d 611
St v Adams
221 Wis. 2d 1
(Ct. App. 1998)
St v Elm
201 Wis. 2d 452
(Ct. App. 1996)

5) Ineffectiveness for failure to ask questions, object to questions, or seek mistrial depends on significance of questions and whether different result would occur

St v Gordon
2003 WI 69
262 Wis. 2d 380

6) Whether Atty who fails to object to erroneous jury instructions and/or makes concessions of guilt during final argument performs deficiently depends on the circumstances

St v Lettice
205 Wis. 2d 347
(Ct. App. 1996)

7) Prosecutorial misconduct causing poor preparation and presentation by Def's Atty will justify new trial

St v Brewer
195 Wis. 2d 295
(Ct. App. 1995)
St v Tatum
191 Wis. 2d 547
(Ct. App. 1995)

8) Failure to object to attire or shackles of defense witness may be deficient unless part of legitimate strategy

St v Carter
2002 WI App 55
250 Wis. 2d 851

9) Failure to challenge subjectively biased juror for cause or use peremptory strike may justify new trial

St v Pote
2003 WI App 31
260 Wis. 2d 426

10) Failure to argue mitigating factors at time of sentencing, to request continuance, or to withdraw after Def rejected probation may be deficient performance

St v Guerard
2004 WI 85
273 Wis. 2d 250

11) Failure to effectively argue admissibility of hearsay statements to exculpate Def is deficient performance

St v Krueger
2008 WI App 162
314 Wis. 2d 605

12) Failure to object to testimony offering an opinion as to victim's truthfulness

St v Harris
2012 WI App 79
343 Wis. 2d 479

13) Failure to object to inaccurate information presented to and referred to by Ct at reconfinement hearing after revocation of extended supervision

St v Weigel
2022 WI App 48
404 Wis. 2d 488

14) Failure to object to prosecutor's statement at sentencing that breached the plea agreement

E. Ethical violations

1) Conflicts of interest—multiple representation

Wheat v US
108 SCt 1692 (1988)
St v Kaye
106 Wis. 2d 1 (1982)

a. Ct must conduct inquiry whenever same Atty or law firm represents more than one Def in same criminal case

b. For recommended procedure of inquiry, see Wis JI-Cr SM-45

c. Waiver of right to separate counsel must be free, voluntary and understanding

St v Miller
160 Wis. 2d 646 (1991)

d. Ct has authority to disqualify counsel, even over Def's objection and over Def's adequate waiver of right to conflict-free representation, when actual or serious potential conflict of interest exists

- Ct should be alert to possibility that government may seek to create conflict to eliminate formidable adversary

Strickland v Washington
104 SCt 2052 (1984)
St v Street
202 Wis. 2d 533
(Ct. App. 1996)
St v Villarreal
2013 WI App 33
346 Wis. 2d 690

e. Prejudice in multiple-representation cases presumed if Def demonstrates by clear and convincing evidence that counsel actively represented conflicting interests and that actual conflict of interest adversely affected Def's Atty's performance

- Actual conflict of interest exists when Atty's advocacy somehow adversely affected by competing loyalties

St v Dadas
190 Wis. 2d 339
(Ct. App. 1994)

- Conflict of interest exists when incriminating information voluntarily supplied by one client used to

— Provide evidence of another client's criminal activities

— Expose another client to potential criminal prosecution, or

— Provide justification for a sentencing recommendation or a sentence

St v Street
202 Wis. 2d 533
(Ct. App. 1996)

f. Representation of State's witness and Def is conflict in interest, but Def must prove conflict adversely affected performance

2) Conflicts of interest—serial representations

St v Love
227 Wis. 2d 60 (1999)

a. Serial representation occurs when an Atty represents one side in a case, then switches sides to represent other side in same or unrelated case

b. Potential multiple or serial representation conflicts must be disclosed to Def and Ct as soon as possible before trial to allow hearing and change of counsel or waiver of conflict if required

St v Love
227 Wis. 2d 60 (1999)

c. Def raising serial representation conflict of interest initially after trial must prove by clear and convincing evidence that trial counsel converted potential conflict into actual conflict of interest by

- Knowingly failing to disclose to Def or Ct before trial the Atty's former prosecution of Def, or

- Representing the Def in a manner that adversely affected Def's interests

d. If either of factors above are proven, Ct should provide appropriate relief for Def and Atty is subject to Office of Lawyer Regulation (OLR) discipline

St v Love
227 Wis. 2d 60 (1999)

e. Def entitled to no relief when Atty reasonably had no recollection of prosecuting Def in same case and when Atty represented Def effectively at sentencing after revocation of probation

St v Cobbs
221 Wis. 2d 101
(Ct. App. 1998)

f. Prior prosecutions of Def by Def's Atty may not conflict with current representation of Def if Ct engages in *Kaye* colloquy with Def and no actual competing loyalties exist

3) Other conflicts of interest

Walberg v Israel
766 F2d 1071
(7th Cir 1985)

a. Conflict of interest when Trial Judge threatened defense counsel with denial of further indigent appointments if counsel pressed too hard

St v Franklin
111 Wis. 2d 681
(Ct. App. 1983)

b. Conflict of interest when defense counsel sought bail assignment for fee when plea agreement was bail money to be used for restitution

Nix v Whiteside
106 SCt 988 (1986)

4) Perjury dilemma

SCR 20:3.3

a. No constitutional right to testify falsely

SCR 20:3.4

b. Counsel may not knowingly assist in presenting false evidence

St v McDowell
2004 WI 70
272 Wis. 2d 488

c. Absent extraordinary circumstances, Def's Atty cannot know Def will testify falsely unless Def admits intent to do so

Strickland v Washington
104 SCt 2052 (1984)

F. Duty to consult with Def on important decisions

St v Divanovic
200 Wis. 2d 210
(Ct. App. 1996)

1) Counsel must follow Def's instructions on fundamental defense objective

St v Yang
201 Wis. 2d 725
(Ct. App. 1996)
St v Jackson
188 Wis. 2d 537
(Ct. App. 1994)

2) Decision to poll jurors is delegated to Atty, and failure to inform Def of significance of right to poll jury may not be ineffective counsel

St v Eckert
203 Wis. 2d 497
(Ct. App. 1996)

3) Deficient performance when counsel fails to do the following

St v Ludwig
124 Wis. 2d 600 (1985)

a. Inform Def of plea offer

St v Felton
110 Wis. 2d 485 (1983)
St v Byrge
225 Wis. 2d 702
(Ct. App. 1999)
aff'd on other grounds
2000 WI 101
237 Wis. 2d 197

b. Consult with Def before withdrawal of NGI plea, but counsel not ineffective if Def presents voluntary and understanding waiver and refuses to testify and follow counsel's recommendation

St v Naydihor
2004 WI 43
270 Wis. 2d 585
St v Smith
207 Wis. 2d 258 (1997)
St v Sprang
2004 WI App 121
274 Wis. 2d 784

c. Object to violation of plea agreement by DA, but may forgo objection if decision to forgo is strategically sound and counsel first consults Def

St v Eckert
203 Wis. 2d 497
(Ct. App. 1996)

d. Discuss with Def submission of lesser included offenses, unless submission would be inconsistent with Def's theory of defense

St v McDowell
2004 WI 70
272 Wis. 2d 488

e. Inform Def, opposing counsel, and Ct of change to narrative questioning style when counsel has knowledge Def will testify falsely

St v Shata
2015 WI 74
364 Wis. 2d 63

f. Advise that pleading guilty to charge may result in deportation

St v Johnson
133 Wis. 2d 207 (1986)

G. Competency of Def to proceed is decided by Ct, so failure to bring evidence of incompetency to Ct's attention constitutes ineffective assistance of counsel

Garza v Idaho
139 SCt 738 (2019)

H. Presumption of prejudice applies when counsel does not honor Def's request to file appeal notwithstanding Def's waiver of appeal right

3. Disciplinary Implications of Finding Attorney Ineffective

SCR 20:1.1, 20:1.3

A. Particular duties of Attys

1) A lawyer should act with competence, proper care, and proficiency

2) A lawyer may not handle a legal matter without adequate preparation

SCR 20:1.7
In re Eisenberg
117 Wis. 2d 332 (1984)

3) A lawyer must decline proffered employment under circumstances that would likely adversely affect independent professional judgment on behalf of another client

St v Love
227 Wis. 2d 60 (1999)

4) Knowing failure to advise Def or Ct of potential conflict of interest subjects Atty to OLR discipline

SCR 60.04(3)(b)

B. Response of Judges

1) Take appropriate action if substantial likelihood that Atty has violated rules of professional conduct

2) If personal knowledge that Atty committed violation of rules of professional conduct, raising substantial question as to Atty's honesty, trustworthiness, or fitness as lawyer, inform OLR

4. Ineffective Assistance of Appellate Counsel

Evitts v Lucey
105 SCt 830 (1985)

A. Due process requires that a Def receive effective assistance under first appeal as of right

St v Evans
2004 WI 84
273 Wis. 2d 192
St v Knight
168 Wis. 2d 509 (1992)

B. Proper procedure is petition for writ of habeas corpus brought before the appellate Ct

St ex rel Panama v Hepp
2008 WI App 146
314 Wis. 2d 112
St ex rel Rothering v McCaughtry
205 Wis. 2d 675
(Ct. App. 1996)

1) Claim of ineffective assistance of postconviction motion counsel should be raised in Trial Ct by either petition for habeas corpus or a § 974.06 motion

St ex rel Kyles v Pollard
2014 WI 38
354 Wis. 2d 626

2) Claim for ineffective assistance of trial counsel for failure to file notice of intent to pursue postconviction relief must be filed in Appellate Ct by petition for habeas corpus

St ex rel Warren v Meisner
2020 WI 55
392 Wis. 2d 1

3) Claim for ineffective postconviction counsel for failure to raise claim of ineffective trial counsel is in Circuit Ct

C. Question of effective assistance of appellate counsel is mixed question of law and fact

St ex rel Flores v St
183 Wis. 2d 587 (1994)

1) *Machner*-type hearing may be necessary

2) Hearing—expect remand to Trial Ct for fact-finding

McCoy v Ct of Appeals
108 SCt 1895 (1988)

D. Def has burden to prove ineffective assistance of appellate counsel

St ex rel Flores v State
183 Wis. 2d 587 (1994)

1) Deficient performance by counsel

St v Starks
2013 WI 69
349 Wis. 2d 274,
modified in part on other grounds by St ex rel Warren v Meisner, 2020 WI 55, 392 Wis. 2d 1

a. When Def alleges deficiency for not raising a particular claim, Def must show the particular nonfrivolous issue is "clearly stronger" than issues that counsel did present

St v Romero-Georgana
2014 WI 83
360 Wis. 2d 522

- Consider any objectives or preferences Def conveyed to Atty

2) Deficient performance was prejudicial

St ex rel Flores v St
183 Wis. 2d 587, 620 (1994)

a. Prejudice is presumed from complete denial of right to appeal

E. Grounds for ineffective appellate assistance

St ex rel Schmelzer
v Murphy
201 Wis. 2d 246 (1996)

1) Failure to perfect appeal or filing of tardy petition for review

2) Failure to file no-merit report unless a voluntary and intelligent waiver

3) Failure to raise meritorious claims on appeal

St ex rel Ford v Holm
2004 WI App 22
269 Wis. 2d 810

4) Wrongly concluding Def had knowingly and intelligently waived right to counsel or right to appeal

St ex rel Schmidt
v Cooke
180 Wis. 2d 187
(Ct. App. 1993)

F. Def is entitled to bring only one such writ before the appellate Ct

St ex rel Dismuke
v Kolb
149 Wis. 2d 270
(Ct. App. 1989)

1) Unless Def can adequately explain why all issues relating to ineffective assistance were not raised in first petition

St ex rel Washington v St
2012 WI App 74
343 Wis. 2d 434

G. Laches is an available defense to have against a petition

CR 42: § 974.06 MOTIONS

1. Nature of Motion

A. Purpose

§ 974.06(1)
St v Carter
131 Wis. 2d 69 (1986)

1) To collaterally challenge validity of judgment of conviction and sentence

St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

a. Not challenge to validity of custody itself, unlike habeas corpus procedures

St v Nicholson
148 Wis. 2d 353
(Ct. App. 1988)

b. Cannot reach procedural errors that do not reach constitutional or jurisdictional status

c. Not substitute for

Peterson v St
54 Wis. 2d 370 (1972)

- Motion for new trial

St v Flores
158 Wis. 2d 636
(Ct. App. 1990)

- Motion for modification of sentence (which presupposes valid conviction)

St v Nicholson
148 Wis. 2d 353
(Ct. App. 1988)

- Direct appeal

Zuehl v St
69 Wis. 2d 355 (1975)
Peterson v St
54 Wis. 2d 370 (1972)

2) Sec. 974.06 procedures designed to supplant habeas corpus and other special writs in more convenient forum, Ct of conviction

§ 974.06(8)
Peterson v St
54 Wis. 2d 370 (1972)

a. Remedy of habeas corpus withheld pending resort to § 974.06 motions seeking same relief

Jessen v St
95 Wis. 2d 207 (1980)

b. Procedure does not supplant common-law writ of error *coram nobis*

§ 974.06(2)
St v Brice
61 Wis. 2d 397 (1973)

3) Procedure is further step in Def's original criminal case, not separate civil action

§ 974.06(6)

a. Civil in nature

§ 974.06(6)
St v Walberg
109 Wis. 2d 96 (1982)

b. Burden on Def to overcome finality of criminal conviction

St v Coogan
154 Wis. 2d 387
(Ct. App. 1990)

4) Sec. 974.06 intended to reach constitutional and jurisdictional issues not raised in original trial

B. Scope

St v Walberg
109 Wis. 2d 96 (1982)
St v Kimpel

153 Wis. 2d 697
(Ct. App. 1989)

1) Available only after State process and Def's conviction finalized

2) Sec. 974.06 procedure limited to

St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

a. Issues concerning Ct's jurisdiction to enter judgment or impose sentence

Mack v St
93 Wis. 2d 287 (1980)

- Both personal and subject-matter jurisdiction of convicting Ct

St v Miller
2009 WI App 111
320 Wis. 2d 724
St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

b. Issues of constitutional dimension

Bergenthal v St
72 Wis. 2d 740 (1976)

- Mere allegations that certain trial errors resulted in violation of constitutional rights do not necessarily raise issue to one of constitutional dimensions

§ 974.06(3)(d)
Rohl v St
90 Wis. 2d 18
(Ct. App. 1979)
rev'd on other grounds by
96 Wis. 2d 621 (1980)

- Def must have been denied constitutional rights that render judgment vulnerable to collateral attack

St v Nicholson
148 Wis. 2d 353
(Ct. App. 1988)

- Trial Ct error in failing to submit lesser included instruction, reversible on appeal, does not equate with a due-process constitutional violation

St v Sharlow
106 Wis. 2d 440
(Ct. App. 1982), *aff'd,*
110 Wis. 2d 226 (1983)

3) Motion cannot raise issues decided by previous direct appeal

Sanders v US
83 SCt 1068 (1963)

a. If doubt arises as to whether a § 974.06 motion raises same ground as decided on previous appeal, resolve doubt in favor of petitioner

§ 974.06(4)
St v Klimas
94 Wis. 2d 288
(Ct. App. 1979)

4) Motion may raise issues that for sufficient reason not asserted on direct appeal

Teague v Lane
109 SCt 1060 (1989)

C. Retroactive effect of "new rules" generally prohibited as basis for § 974.06 motion

1) Exceptions

St v Horton
195 Wis. 2d 280
(Ct. App. 1995)

a. If new rule places certain kinds of primary, private individual conduct beyond power of the criminal lawmaking authority to proscribe, or

b. If new rule requires the observance of procedures that are implicit in concept of ordered liberty or constitute watershed rule of criminal procedure

2) "New rule" meets definition if it breaks new ground or imposes a new obligation on State or federal government

2. Conditions Precedent

A. Timely filing

St v Walberg
109 Wis. 2d 96 (1982)

1) Procedure available only after State process and conviction finalized

§ 974.06(1)

a. Time for appeal or other postconviction remedies under § 974.02 must have expired, or

Peterson v St
54 Wis. 2d 370 (1972)

b. Def has completely exhausted direct remedies, including

- Motion for new trial, and
- Appeal

§ 974.06(1)
St v Redmond
203 Wis. 2d 13
(Ct. App. 1996)

2) Ct has no subject-matter jurisdiction to entertain motion until conviction finalized and direct remedies exhausted

B. Venue

§ 974.06(2)

1) Motion is part of original criminal action

§ 974.06(3)
Zuehl v St
69 Wis. 2d 355 (1975)

a. May be brought only in Trial Ct where Def convicted

Krueger v St
53 Wis. 2d 345 (1972)

b. Sec. 974.06 obligates Judge to review allegations that Judge erred in original trial

Recommendation

2) Any other Ct receiving motion papers should transfer motion to original Ct of conviction

St ex rel Warren v Meisner
2020 WI 55
392 Wis. 2d 1

3) Ct of conviction is proper forum for appellate counsel to challenge failure of postconviction counsel to raise ineffective assistance of trial counsel

C. Custody requirement

Jessen v St
95 Wis. 2d 207, 210–11 (1980)
St v Schill
93 Wis. 2d 361, 373 (1980)

1) Custody is "rigid" condition for subject-matter jurisdiction imposed by legislature

§ 974.06(1)
Jessen v St
95 Wis. 2d 207 (1980)
St v Theoharopoulos
72 Wis. 2d 327 (1976)
St v Bell
122 Wis. 2d 427 (Ct. App. 1984)

2) Def must be a "prisoner in custody under sentence of a court"

St v Theoharopoulos
72 Wis. 2d 327 (1976)

a. "Custody under sentence of a court" not custody, unless related to Wis State Ct process

- Wis sentence or Wis process must mandate Def's custody
- Wis State Cts have no jurisdiction to set aside custody vested in federal authorities

b. Custody requirement should be interpreted liberally in this context

§ 301.048(4)(a)

c. Def in intensive sanctions program is "prisoner in custody under sentence of a court"

St v Mentzel
218 Wis. 2d 734

(Ct. App. 1998)

d. Def on straight probation with sentence withheld is "in custody under sentence of a court"

Thiesen v St
86 Wis. 2d 562 (1979)
St v Bell
122 Wis. 2d 427
(Ct. App. 1984)

3) Expired sentence or judgment, when custody no longer in effect

a. Ct loses subject-matter jurisdiction to decide a § 974.06 motion

b. Motion not mooted by expiration of sentence or judgment

St v Witkowski
163 Wis. 2d 985
(Ct. App. 1991)

c. Motion not mooted by death of Def

St v Schill
93 Wis. 2d 361 (1980)

4) Judgment for fine as only sanction not sufficient for § 974.06 jurisdiction

3. Authorized Grounds for Motion

Mack v St
93 Wis. 2d 287 (1980)
St v Carter
131 Wis. 2d 69
(Ct. App. 1986)

A. Grounds cognizable under § 974.06 are narrow and preclude all claims except those expressly enumerated

§ 974.06(1)

B. Sentences imposed in violation of State law

St ex rel Warren v Cty Ct
54 Wis. 2d 613 (1972)

1) Sec. 974.06 motion not remedy for ordinary rehearing or reconsideration of sentencing on merits

St v Coolidge
173 Wis. 2d 783
(Ct. App. 1993)

2) Sec. 974.06 motion and motion to modify sentence conceptually distinct

a. Sec. 974.06 motion challenges authority of Ct to impose sentence

b. Motion to modify sentence seeks to alter terms of sentence validly imposed

§ 974.06(1)

C. Convictions and sentences imposed in violation of US or Wis Constitution

Walberg v St
73 Wis. 2d 448 (1976)

St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

1) Sec. 974.06 motion must raise issue of constitutional dimension

St v Carter
131 Wis. 2d 69 (1986)
Bergenthal v St
72 Wis. 2d 740 (1976)

2) Mere allegations that certain trial errors resulted in violation of constitutional rights do not necessarily raise issue to one of constitutional dimensions

§ 974.06(3)(d)
Rohl v St
90 Wis. 2d 18
(Ct. App. 1979)
rev'd on other grounds
96 Wis. 2d 621 (1980)

3) Def must have been denied constitutional rights that render judgment vulnerable to collateral attack

§ 974.06(1)

D. Ct lacked jurisdiction to impose sentence, including

Walberg v St
73 Wis. 2d 448 (1976)

1) Jurisdiction over person of Def, or

Mack v St
93 Wis. 2d 287 (1980)

2) Jurisdiction over subject matter of proceedings

a. As failure to charge any offense known to law

3) Double jeopardy claim

§ 974.06(1)

E. Sentence imposed in excess of maximum authorized by law

St ex rel Warren v Cty Ct
54 Wis. 2d 613 (1972)

1) Sec. 974.06 motions seldom raise issue because

§ 973.13

a. Sec. 973.13 automatically invalidates excess of sentence to extent of maximum term authorized by law, and

§ 973.13

b. Sec. 973.13 provides that sentence "shall stand commuted without further proceedings"

§ 974.06(1)

F. Sentence imposed is otherwise subject to collateral attack

G. Waivers of grounds for motion

§ 974.06(4)

1) Sec. 974.06 itself countenances voluntary and intelligent waivers of grounds for motion

2) Waivers may occur during

§ 974.06(4)

a. Proceeding that resulted in Def's conviction or sentence, including

- Entering guilty plea
- Trial

§ 974.06(4)

b. Or, any other proceeding Def has taken to secure relief, including

- Motion for new trial
- Direct appeal
- Prior § 974.06 motions

St v Robinson
177 Wis. 2d 46
(Ct. App. 1993)

— Unless claim is for ineffective assistance of counsel (same Atty at trial and appeal)

§ 974.06(4)
St v Klimas
94 Wis. 2d 288
(Ct. App. 1979)

3) If Def does not raise issues cognizable on motion for new trial or direct appeal, such issues waived as basis for § 974.06 motions, unless

a. Ct finds ground for relief asserted that for sufficient reason was not asserted earlier, or

§ 974.06(4)

b. Ct finds ground for relief asserted that for sufficient reason was inadequately raised earlier

§ 974.06(4)
State ex rel Dismuke v Kolb
149 Wis. 2d 270
(Ct. App. 1989)

4) Def's failure to assert particular ground for relief in initial § 974.06 motion bars Def's assertion of ground in later motion, in absence of justification for omission

§ 974.06(4)

a. Sufficient reason for not asserting ground for relief must be found by Ct, or

§ 974.06(4)
St v Love

2005 WI 116
284 Wis. 2d 111
St v McReynolds
2022 WI App 25
402 Wis. 2d 175
pet for rev denied

b. Must be sufficient reason why ground was inadequately raised previously, e.g., newly discovered evidence, change in postconviction counsel

St ex rel Dismuke v Kolb
149 Wis. 2d 270
(Ct. App. 1989)

c. Def does not have unlimited right to file successive motions for relief

St v Braun
185 Wis. 2d 152 (1994)

5) Dismissal of previous motion because Def has escaped is final adjudication

4. Form of Motion

§ 974.06(4)

A. Def must raise all grounds for relief simultaneously in original motion, except Def may

1) Supplement original motion, and

2) Amend original motion

§ 974.06(1), (8)

B. Motion directed to Ct that imposed Def's sentence

C. Recusal of Judge

Krueger v St
53 Wis. 2d 345 (1972)

1) Def has no automatic right to substitution of Judge

§ 971.20(4)
Krueger v St
53 Wis. 2d 345 (1972)

a. Statutory request for substitution not timely under § 974.06

§ 974.06(1), (8)
Krueger v St
53 Wis. 2d 345 (1972)

b. Sec. 974.06 obligates Trial Judge to review allegation that Judge erred in original trial

Bergenthal v St
72 Wis. 2d 740 (1976)

2) Def may ask Judge to disqualify self from hearing motion on grounds of prejudice

Recommendation

a. Def should make request in original petition

Bergenthal v St
72 Wis. 2d 740 (1976)

3) Judge has discretion whether to disqualify self if issue of prejudice raised or reasonably shown

5. Preliminary Procedure for Examining Petition

A. Generally

§ 974.06(3)
Smith v St
60 Wis. 2d 373 (1973)

1) Ct first examines petitioner's motion and record before granting any hearing

Levesque v St
63 Wis. 2d 412 (1974)

a. Intended to be prescreening procedure fair to both petitioner and Ct

§ 974.06(3)
St v Carter
131 Wis. 2d 69 (1986)
Smith v St
60 Wis. 2d 373 (1973)

2) Ct makes threshold determination whether petitioner's motion and records of action conclusively show prisoner entitled to no relief

§ 974.06(3)
Smith v St
60 Wis. 2d 373 (1973)

a. If motion and record conclusively show prisoner entitled to no relief, Ct may summarily dismiss motion without hearing

- *See* "**Summary Dismissal**," **Sec. 6**, *infra*

§ 974.06(3)
Sanders v St
69 Wis. 2d 242 (1975)
Smith v St
60 Wis. 2d 373 (1973)

b. Otherwise, Ct may grant evidentiary hearing in its discretion

- *See* "**Granting a Hearing**," **Sec. 7**, *infra,* and

- *See* "**Hearing Procedures**," **Sec. 8**, *infra*

c. If issue purely legal, motion may be considered on briefs, with or without hearing

B. Appointment of amicus curiae

Smith v St
60 Wis. 2d 373 (1973)

Peterson v St
54 Wis. 2d 370 (1972)

1) Ct may appoint Atty as amicus curiae to study Def's motion and records

Holmes v St
63 Wis. 2d 389 (1974)

a. CAUTION: Ct should not appoint members of prosecutor's staff

Smith v St
60 Wis. 2d 373 (1973)
Peterson v St
54 Wis. 2d 370 (1972)

2) Amicus curiae reports to Ct whether Def's motion and records do or do not conclusively show Def entitled to no relief

Smith v St
60 Wis. 2d 373 (1973)
Peterson v St
54 Wis. 2d 370 (1972)

3) Amicus curiae Atty's conclusions not conclusive

a. Merely assists Ct in arriving at own independent judgment

b. Ct may not "rubber-stamp" amicus curiae Atty's conclusions

C. Independent judicial inquiry required

Smith v St
60 Wis. 2d 373 (1973)

1) Ct must independently examine Def's motion and record

Smith v St
60 Wis. 2d 373 (1973)
Peterson v St
54 Wis. 2d 370 (1972)

2) Ct must itself make final decision on merits of Def's motion

6. Summary Dismissal

A. Standard for determination

§ 974.06(3)
Smith v St
60 Wis. 2d 373 (1973)

1) If Def's motion and record conclusively show Def entitled to no relief, Ct may summarily dismiss motion without hearing

Bergenthal v St
72 Wis. 2d 740 (1976)

a. Summary dismissal within Ct's discretion

Zuehl v St
69 Wis. 2d 355 (1975)

2) Sec. 974.06 petition to be liberally construed in determining whether Def's motion has arguable merit

B. Grounds for summary dismissal

Rohl v St
96 Wis. 2d 621 (1980)

1) Motion fails to allege sufficient facts to raise question of fact

Recommendation

a. If original petition inadequate, allow Def to supplement or amend motion

Recommendation

- Dismiss if Def still unable to allege sufficient facts

Rohl v St
96 Wis. 2d 621 (1980)
St v Flores
158 Wis. 2d 636
(Ct. App. 1990)

2) Motion presents only conclusory allegations

Levesque v St
63 Wis. 2d 412 (1974)

a. Statement of ultimate facts that may be sufficient to sustain complaint against demurrer not sufficient for § 974.06 motion

Zuehl v St
69 Wis. 2d 355 (1975)

b. Mere recital of legal grounds on which postconviction relief premised presents only conclusory allegations

Rohl v St
96 Wis. 2d 621 (1980)
Levesque v St
63 Wis. 2d 412 (1974)
St v Flores
158 Wis. 2d 636
(Ct. App. 1990)

- Def cannot stand on such conclusory allegations, hoping to supplement them at hearing

Levesque v St
63 Wis. 2d 412 (1974)
Nelson v St
54 Wis. 2d 489 (1972)

c. If Def alleges facts that, if true, would entitle Def to relief, Ct must hold evidentiary hearing

Zuehl v St
69 Wis. 2d 355 (1975)
Levesque v St
63 Wis. 2d 412 (1974)

- Same test as for motion to withdraw guilty plea

Recommendation

d. If original petition inadequate, allow Def to supplement or amend motion

Recommendation

- Dismiss if Def still unable to recite facts in support of allegations

§ 974.06(1)
Jessen v St
95 Wis. 2d 207 (1980)

3) Def not "a prisoner in custody under sentence of a court"

St v Theoharopoulos
72 Wis. 2d 327 (1976)
St v Bell
122 Wis. 2d 427
(Ct. App. 1984)

a. Ct has no subject-matter jurisdiction to hear Def's motion

- *See* "**Conditions Precedent**," **Sec. 2**, *supra*

Recommendation

b. Lack of custody is ground for dismissal better dealt with at hearing

St v Redmond
203 Wis. 2d 13
(Ct. App. 1996)

4) Def has failed to exhaust available direct remedies

§ 974.06(1)

a. Time for appeal or other postconviction remedies under § 974.02 not expired

Peterson v St
54 Wis. 2d 370 (1972)

b. Def still has time to

- Make motion for new trial, and
- Appeal

§ 974.06(1)
Comment
St v Walberg
109 Wis. 2d 96 (1982)

c. Ct has no subject-matter jurisdiction to entertain motion until Def's conviction finalized and direct remedies exhausted

5) Def raising issues not cognizable under § 974.06

a. *See* "**Purpose**" and "**Scope**," in **Sec. 1**, *supra*

6) Def previously waived grounds for relief now asserted

§ 974.06(4)

a. During proceeding that resulted in Def's conviction or sentence, including

- Entering guilty plea
- Trial

§ 974.06(4)

b. During any other proceeding Def has taken to secure relief, including

- Motion for new trial
- Direct appeal
- Prior § 974.06 motions

St v Starks
2013 WI 69, ¶ 46
349 Wis. 2d 274
modified in part on other grounds by St ex rel Warren v Meisner
2020 WI 55
392 Wis. 2d 1

— Motion for sentence modification does not bar subsequent § 974.06 motion

§ 974.06(4)

c. If Def does not raise all grounds for relief in first § 974.06 motion, such grounds are waived as basis for subsequent § 974.06 motions, unless

§ 974.06(4)

- Ct finds ground for relief asserted that for sufficient reason was not asserted earlier, or

§ 974.06(4)

- Ct finds ground for relief asserted that for sufficient reason was inadequately raised earlier

Bergenthal v St
72 Wis. 2d 740 (1976)
overruled in part by St v Escalona-Naranjo
185 Wis. 2d 168 (1994)

d. Issues of "constitutional dimension" not waived, even though Def did not raise such issues in

- Motion for new trial
- Prior § 974.06 motions

St v Braun
185 Wis. 2d 152 (1994)

e. Because of escape status at time of original motion

Recommendation

f. Whether Def waived ground for relief now asserted is better dealt with at hearing

St v Allen
2010 WI 89
328 Wis. 2d 1
St v Lo
2003 WI 107
264 Wis. 2d 1
St v Escalona-Naranjo
185 Wis. 2d 168 (1994)

7) Motion raises issues that should have been raised on direct appeal, on motion for new trial, or in response to a no-merit report, unless

§ 974.06(4)
St v Klimas
94 Wis. 2d 288
(Ct. App. 1979)

a. Ct finds ground for relief asserted that for sufficient reason was not asserted earlier, or

§ 974.06(4)
St v Tolefree
209 Wis. 2d 421
(Ct. App. 1997)

b. Ct finds ground for relief asserted that for sufficient reason was inadequately raised earlier

St v Love
2005 WI 116
284 Wis. 2d 111

8) Ineffective assistance of trial counsel

St v Escalona-Naranjo
185 Wis. 2d 168 (1994)

a. Claim not allowed if it could have been raised in previously filed motion under § 974.02 or direct appeal

Loop v St
65 Wis. 2d 499 (1974)

b. Ineffective assistance can be raised if no previously filed § 974.02 or direct appeal motion

St v Klimas
94 Wis. 2d 288
(Ct. App. 1979)

c. However, § 974.06(4) does not exempt a constitutional issue from this limitation unless Ct finds a "sufficient reason" for failure to allege matter in earlier motion

St ex rel Warren v Meisner
2020 WI 55
392 Wis. 2d 1
St v Romero-Georgana
2014 WI 83
360 Wis. 2d 522
St v Hensley
221 Wis. 2d 473
(Ct. App. 1998)
St v Robinson
177 Wis. 2d 46
(Ct. App. 1993)

9) Petition by appellate counsel to challenge failure of postconviction counsel to raise ineffective assistance of trial counsel should be filed in Trial Ct

a. Prior § 974.06 petition does not preclude a second petition alleging ineffective assistance of trial and appellate counsel, if Def was represented by same Atty at trial and on appeal

b. When same Atty represents Def at trial and on appeal, Atty's inability to assert own ineffectiveness is a "sufficient reason" under § 974.06(4)

St v Romero-Georgana
2014 WI 83
360 Wis. 2d 522

c. Def who alleges that postconviction counsel was ineffective for failing to bring certain claims must demonstrate that those claims are clearly stronger than the claims postconviction counsel actually brought

C. Ct must make detailed record on summary dismissal

Smith v St
60 Wis. 2d 373 (1973)

1) Ct must issue written opinion supporting decision

Nelson v St
54 Wis. 2d 489 (1972)

2) Opinion must show that Ct independently reviewed Def's motion and records

Smith v St
60 Wis. 2d 373 (1973)

a. "Sufficient particularity" is standard

Smith v St
60 Wis. 2d 373 (1973)

b. When Def claims multiple grounds for relief, particularized rulings as to each required

Smith v St
60 Wis. 2d 373 (1973)

c. Formal findings of fact and conclusions of law may be unnecessary

- As when Def presented only conclusory allegations in motion

D. Notice to Def of right to appeal

Recommendation
St v Argiz
101 Wis. 2d 546 (1981)

1) Upon summary dismissal, Def should be given notice of right to appeal

Peterson v St
54 Wis. 2d 370 (1972)
US ex rel Singleton
v Woods
440 F2d 835
(7th Cir 1971)

a. Notice has been mandated following Def's conviction, but not yet mandated following summary dismissal of § 974.06 motion

7. Granting a Hearing

A. Standard for granting hearing

St v Allen
2004 WI 106
274 Wis. 2d 568

1) Ct has discretion to deny motion without hearing if

a. Motion fails to provide sufficient material facts—who, what, where, when, why, and how—that, if true, would entitle to Def to relief requested, and

b. Ct's review of record conclusively demonstrates that Def is not entitled to relief

St v Love
2005 WI 116, ¶ 29 n10
284 Wis. 2d 111

2) Motion should be liberally construed in determining whether it has arguable merit

Smith v St
60 Wis. 2d 373 (1973)

3) Ct may order hearing only as to some issues raised and summarily dismiss others

B. Ct serves notice on DA

§ 974.06(3)(a)

1) Ct to cause service of copy of Def's motion on DA

§ 974.06(3)(a)

a. Ct orders written response within fixed, reasonable time

2) Upon DA's response, Ct may

a. Find that Def's motion and records, together with DA's response, now conclusively show Def entitled to no relief, and

b. Summarily dismiss Def's motion

- See "**Summary Dismissal**," **Sec. 6**, *supra*

C. Ct determines whether Atty necessary for Def

Recommendation

1) Necessity of counsel within discretion of Ct

a. Indigent's right to counsel on postconviction motions not yet mandated

Recommendation

b. If evidentiary hearing ordered, Ct should find counsel necessary

§ 974.06(3)(b)

2) Ct to refer Def to SPD for indigency determination and appointment of counsel, provided

Recommendation

a. Def wishes to be represented by Atty, and

§ 974.06(3)(b)

b. Def claims or appears to be indigent, and

§ 974.06(3)(b)

c. Ct determines counsel necessary upon review of

- Def's motion and records
- DA's response

§ 974.06(3)(c)

D. Ct schedules prompt hearing

E. Ct determines if Def's presence required at hearing

§ 974.06(5)

1) Ct may entertain and determine Def's motion without requiring production of Def at hearing

Sanders v St
69 Wis. 2d 242 (1975)

a. Presence of Def at hearing within discretion of Ct

§ 974.06(5)

b. Motion may be heard by telephone in Ct's discretion under § 807.13

2) Guidelines for Ct's determination

Sanders v St
69 Wis. 2d 242 (1975)
WSA, § 974.06 –Judicial
Council Note, 1969

a. If hearing is evidentiary hearing, Def must be present when

- Substantial issue of fact presented, and

St v Saunders
196 Wis. 2d 45
(Ct. App. 1995)

- Issue supported beyond mere allegation

Sanders v St
69 Wis. 2d 242 (1975)

b. If Def represented by counsel, Def need not be present when

- Only issues of law raised, or
- No substantial issues of fact raised

Recommendation

c. If Def not represented by counsel, Def should be present at any hearing

3) If Def's presence necessary, Ct should issue writ of habeas corpus *ad testificandum* to obtain Def's presence

8. Hearing Procedures

A. Scope of hearing

1) Ct determines scope of hearing

Sanders v US
83 SCt 1068 (1963)
Sanders v St
69 Wis. 2d 242 (1975)

a. Ct has discretion to determine whether Def's claim substantial before granting full evidentiary hearing

Smith v St
60 Wis. 2d 373 (1973)

b. Ct may order hearing as to particular issues raised by Def's motion, and deny hearing as to others

St v Rohl
104 Wis. 2d 77
(Ct. App. 1981)

2) Ct not bound by previous trial proceedings

St v Carter
131 Wis. 2d 69 (1986)

a. Ct may receive evidence and try issues anew

B. Burden of proof

§ 974.06(6)

1) Sec. 974.06 proceedings civil in nature

§ 974.06(6)
St v Walberg
109 Wis. 2d 96 (1982)

2) Burden on Def to overcome finality of criminal conviction

St v Walberg
109 Wis. 2d 96 (1982)
St v Flores
158 Wis. 2d 636
(Ct. App. 1990)

3) Def must show by clear and convincing evidence that Ct

a. Rendered judgment without jurisdiction, or

b. Denied Def constitutional rights, which render judgment vulnerable to collateral attack, or

c. Imposed sentence not authorized by law, or

d. Imposed sentence otherwise subject to collateral attack

C. Adjudication

§ 974.06(3)(d)
Smith v St
60 Wis. 2d 373 (1973)

1) Ct must make formal findings of fact and conclusions of law

§ 974.06(3)(d)

2) Def must be granted relief, if Ct finds

a. Judgment rendered without jurisdiction

b. Sentence imposed not authorized by law

c. Def denied certain constitutional rights so as to render judgment vulnerable to collateral attack

d. Sentence imposed otherwise subject to collateral attack

3) Def may be denied relief, when Ct finds

St v Sharlow
106 Wis. 2d 440
(Ct. App. 1982), *aff'd,*
110 Wis. 2d 226 (1983)

a. Error harmless beyond a reasonable doubt

St v Walberg
109 Wis. 2d 96 (1982)
Rohl v St
90 Wis. 2d 18
(Ct. App. 1979)
rev'd on other grounds by
96 Wis. 2d 621 (1980)

b. Def failed to prove claims by clear and convincing evidence

§ 974.06(3)(d)
St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

4) Ct's discretion to fashion relief strictly limited by statutory language

§ 974.06(3)(d)

5) Forms of relief available

a. Vacate and set aside judgment

Comment

- Discharge Def

§ 974.06(3)(d)

b. Grant Def new trial

c. Correct Def's sentence as appropriate

d. Resentence Def

D. Notice to Def of right to appeal

Recommendation
St v Argiz
101 Wis. 2d 546 (1981)

1) Upon final disposition of § 974.06 motion, Def should be given notice of right to appeal

Peterson v St
54 Wis. 2d 370 (1972)
US ex rel Singleton
v Woods
440 F2d 835
(7th Cir 1971)

a. Notice mandated following Def's conviction, but not yet mandated following final disposition of § 974.06 motion

9. Appeal

§ 974.06(7)

A. Def may appeal from order entered on motion as from final judgment, including

1) Order summarily dismissing entire motion, or portions of motion

2) Order denying relief after hearing

3) Order granting relief after hearing

§ 974.02
§ 809.30
§ 809.40

B. Time constraints for appeal are same as in civil case

1) *See also* **CR 40, Sec. 1**

CR 43: WITHDRAWAL OF PLEA

Santobello v New York
92 SCt 495 (1971)

1. Withdrawal of Plea Based on Breach of Plea Agreement

St v Bowers
2005 WI App 72
280 Wis. 2d 534

A. Either party entitled to withdraw from plea agreement if other party breaches

1) Breach must be material and substantial

St v Bokenyi
2014 WI 61, ¶ 40
355 Wis. 2d 28

a. A material and substantial breach is one that violates the terms of the agreement and defeats a benefit for the nonbreaching party

St v Nietzold
2023 WI 22
406 Wis. 2d 349

b. Corrected misstatement is not such a breach

St v Stewart
2013 WI App 86, ¶¶ 18–19, 349 Wis. 2d 385

c. Prosecutor need not disavow victim's differing sentence recommendation

St v Stewart
2013 WI App 86, ¶ 15
349 Wis. 2d 385
St v Matson
2003 WI App 253, ¶ 26
268 Wis. 2d 725

d. "State" includes investigating officer, but not when officer is a victim

St v Smith
207 Wis. 2d 258, 281 (1997)
St v Matson
2003 WI App 253, ¶ 27
268 Wis. 2d 725

e. Prejudice is presumed when material and substantial breach

St v Deilke
2004 WI 104, ¶ 13
274 Wis. 2d 595

f. Burden on party asserting breach by clear and convincing evidence

St v Tourville
2016 WI 17, ¶ 36
367 Wis. 2d 285

g. To establish a breach, a party must establish that item was bargained for in the plea agreement; a plea agreement silent on a topic such as concurrent/consecutive sentences is not breached by a consecutive sentence

St v Williams
2002 WI 1
249 Wis. 2d 492

2) Prosecutor may not render less than a neutral recitation of plea agreement

St v Fortes
2015 WI App 25, ¶¶ 23–25, 361 Wis. 2d 249

3) Breach of plea agreement waived if issue not raised before Def sentenced

St v Neuaone
2005 WI App 124
284 Wis. 2d 473

4) Agreement to withhold relevant information from Ct is contrary to public policy; disclosure of such information is not breach

St v Reed
2013 WI App 132, ¶¶ 7, 12, 351 Wis. 2d 517

5) Remedy is in Circuit Ct's discretion: not every breach requires a remedy; breach must deprive the nonbreaching party of a material and substantial benefit for which the party bargained

St v Toliver
187 Wis. 2d 346
(Ct. App. 1994)

B. Under some circumstances, party who has breached may not be permitted to withdraw

St v Deilke
2004 WI 104, ¶ 25
274 Wis. 2d 595
St v Bembenek
2006 WI App 198
296 Wis. 2d 422

1) Remedy depends on totality of circumstances—whether to vacate plea, reinstate original offer, or both

St v Bokenyi
2014 WI 61, ¶ 40
355 Wis. 2d 28
St v Deilke
2004 WI 104, ¶¶ 14, 25
274 Wis. 2d 595

2) Material and substantial breach is one that violates the terms of the agreement and defeats a benefit for the nonbreaching party. It is manifest injustice

St v Rivest
106 Wis. 2d 406, 414
(1982)

C. Party seeking to vacate agreement must establish fact of breach and that breach was sufficiently material to warrant releasing party, whether prosecution or defense, from its promise

St v Tucker
2012 WI App 67, ¶¶ 13–14, 342 Wis. 2d 224

1) Evidentiary hearing required to determine whether breach occurred and whether breach is material, if there is a dispute as to either issue

2. Withdrawal of Plea Before Sentencing or After Sentence Vacated

St v McKnight
65 Wis. 2d 582 (1974)

A. Def has no absolute right to withdraw plea before sentencing

Dudrey v St
74 Wis. 2d 480 (1976)
St v Simpson
200 Wis. 2d 798
(Ct. App. 1996)

1) Motion directed to sound discretion of Ct

Nelson v St
54 Wis. 2d 489, 496
(1972)

2) Evidentiary hearing to be granted liberally

St v Lopez
2014 WI 11, ¶ 2
353 Wis. 2d 1
St v Canedy
161 Wis. 2d 565 (1991)

3) Ct should freely allow Def to withdraw plea before sentencing for any fair and just reason, unless the prosecution would be substantially prejudiced

St v Leitner
2001 WI App 172
247 Wis. 2d 195
aff'd on other grounds
2002 WI 77
253 Wis. 2d 449

a. Freely does not mean automatically and requires a showing of some adequate reason for Def's change of heart other than desire to have a trial

b. See Recantation, **Sec. 3.B.**2)f., *infra*

St v Nash
2020 WI 85, ¶ 31
394 Wis. 2d 238

c. Burden of proof on Def by preponderance of evidence

St v Bollig
2000 WI 6
232 Wis. 2d 561

4) Once Def has presented a fair and just reason for plea withdrawal, burden shifts to State to demonstrate substantial prejudice to defeat plea withdrawal

St v Cooper
2019 WI 73, ¶¶ 28–29
387 Wis. 2d 439

5) Lawyer's violation of professional conduct rules is not necessarily a basis for withdrawal of plea on ground of ineffective assistance of counsel

St v Marinez
2008 WI App 105
¶¶ 4, 13–14,
313 Wis. 2d 490

B. Ct may advise Def that Ct intends to exceed the plea recommendation, and will permit withdrawal of Def's plea

3. Withdrawal of Plea of Guilty or No Contest After Sentencing

Pulaski v St
23 Wis. 2d 138 (1964)

A. Ct has inherent power to hear motion to permit withdrawal of plea

1) Motion directed to sound discretion of Ct

St v Reppin
35 Wis. 2d 377 (1967)

2) Issue not whether Def guilty, but whether Def fairly convicted on plea

St v Bartelt
112 Wis. 2d 467 (1983)

3) Plea is involuntary as matter of law when record does not show that Def

St v Van Camp
213 Wis. 2d 131 (1997)
St v Harrell
182 Wis. 2d 408
(Ct. App. 1994)

a. Was fully informed of all rights waived, and

b. Had ability to comprehend

St v Kelty
2006 WI 101
294 Wis. 2d 62

4) Multiplicity claim is lost when Def enters knowing, voluntary, and intelligent guilty plea. Viable claim must be based on the record

St v Carlson
2014 WI App 124,
¶¶ 24–25
359 Wis. 2d 123

B. Withdrawal on grounds of manifest injustice

St v Brown
2006 WI 100, ¶ 18
293 Wis. 2d 594

1) Def must show by clear and convincing evidence plea is not voluntarily and knowingly entered, and

a. Withdrawal of plea necessary to prevent manifest injustice

St v Cain
2012 WI 68, ¶ 31
342 Wis. 2d 1

b. Review not limited to plea transcript

St v Hudson
2013 WI App 120, ¶¶ 11–12, 351 Wis. 2d 73

2) Manifest injustice may be shown when

a. Def denied effective assistance of counsel

St v Harper
57 Wis. 2d 543, 557 (1973)

- Standard of review is whether Def given representation equal to that which ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who privately retained Atty's service

Padilla v Kentucky
130 SCt 1473, 1485–86 (2010)
St v Ortiz-Mondragon
2015 WI 73
364 Wis. 2d 1
St v Shata
2015 WI 74
364 Wis. 2d 63
St v Mendez
2014 WI App 57, ¶ 12
354 Wis. 2d 88

- Defense Atty's failure to warn Def of immigration consequences of plea

St v LeMere
2016 WI 41, ¶ 69
368 Wis. 2d 624

- Sixth Amendment guarantee of effective counsel does not require advice of potential Ch 980 proceedings, a collateral consequence

St v Cooper
2019 WI 73, ¶¶ 28–29
387 Wis. 2d 439

- Lawyer's violation of professional conduct rules is not necessarily a basis for withdrawal of plea on ground of ineffective assistance of counsel

St v Henyard
2020 WI App 51,¶¶ 16, 19, 393 Wis.2d 727

- Def Atty previously serving as Comm'r in case not basis for withdrawal unless actual conflict adversely affected representation, as shown by clear and convincing evidence

- *See* **Ineffective Assistance of Counsel**, **CR 41**

b. Plea was not entered or ratified by Def or person authorized to act in Def's behalf

Kruse v St
47 Wis. 2d 460 (1970)
St v Salentine
206 Wis. 2d 419
(Ct. App. 1996)

- Ground does not exist when plea entered and ratified by Def in open Ct while represented by counsel

St v Freland
2011 WI App 80, ¶ 29
334 Wis. 2d 772

c. Plea was involuntary, without knowledge that conduct to which Def pleaded guilty does not fall within charged offense or that sentence actually imposed could be imposed

St v Bangert
131 Wis. 2d 246 (1986)

- Mere inadequacy of plea colloquy does not by itself necessitate withdrawal of plea; reviewing Ct may look to entire record to determine whether Def had actual notice of nature of charge

St v Booth
142 Wis. 2d 232
(Ct. App. 1987)

- Mere disappointment in eventual punishment imposed not ground for withdrawal of guilty plea nor is assertion of innocence

Craker v St
66 Wis. 2d 222 (1974)

- Moral scruples or family pressure to plead guilty are self-coercive elements and do not vitiate voluntary nature of guilty plea

St v Finley
2016 WI 63
370 Wis. 2d 402
St v Dillard
2014 WI 123, ¶ 69
358 Wis. 2d 543
St v Taylor
2013 WI 34, ¶ 33 & n.8
347 Wis. 2d 30

- Misunderstanding of consequences of plea is ground for withdrawal, but must prove actual misunderstanding

St v Cross
2010 WI 70, ¶ 4
326 Wis. 2d 492
St v Lichty
2012 WI App 126
344 Wis. 2d 733

- Entering a plea with an understanding that the maximum sentence is higher than the law allows, but not substantially higher, does not vitiate the plea

St v Hailes
2023 WI App 29
408 Wis. 2d 465
pet for rev denied

- Erroneous application of penalty enhancers to drug charges did not warrant plea withdrawal when considering the totality of the circumstances

Edwards v St
51 Wis. 2d 231 (1971)

- If Def knows which constitutional rights are waived by plea, Def cannot withdraw plea because each right not specifically waived

Santobello v New York
92 SCt 495 (1971)
St v Rivest
106 Wis. 2d 406, 414 (1982)
Young v St
49 Wis. 2d 361 (1971)
St v Poole
131 Wis. 2d 359 (Ct. App. 1986)

d. Def did not receive concessions contemplated by plea agreement and prosecutor failed to seek concessions as promised

St v Frey
2012 WI 99, ¶¶ 62, 77, 102, 343 Wis. 2d 358
St v Straszkowski
2008 WI 65 ¶¶ 5–6, 35, 92–94, 310 Wis. 2d 259

- Intent regarding offenses charged, uncharged read-ins, and dismissed charges as part of plea agreement should be clear

LeFebre v St
40 Wis. 2d 666 (1968)

- Def must prove what plea agreement actually was or contention fails for lack of proof

St v Bangert
131 Wis. 2d 246 (1986)

- Breach of plea agreement must deprive Def of substantial and material benefit for which Def bargained

St v Wills
187 Wis. 2d 529 (Ct. App. 1994)

- Prosecution's "half-hearted" delivery of statement could not be construed as fulfillment of promise to recommend plea

St v Williams
2000 WI 78
236 Wis. 2d 293

- Failure to receive sentence concessions contemplated by a plea agreement is not a basis for withdrawing guilty plea on grounds of manifest injustice

St v Smith
202 Wis. 2d 21 (1996)

e. *Alford* plea does not reflect factual basis for offense

f. To prevail on a claim of newly discovered evidence

St v McAlister
2018 WI 34, ¶ 31
380 Wis. 2d 684

- Def must first prove by clear and convincing evidence that

  — Evidence was discovered after conviction

  — Def not negligent in seeking the evidence

  — Evidence is material to an issue in the case, and

  — Evidence is not merely cumulative

St v McAlister
2018 WI 34, ¶ 33
380 Wis. 2d 684

- If based on recantation, Def must show corroborating evidence consisting of

  — Feasible motive for initial false statement

  — Circumstantial guarantees of trustworthiness of recantation

St v Allen
2004 WI 106
274 Wis. 2d 568

- Ct should review motion and determine whether each of these elements is sufficiently alleged before evidentiary hearing is required

St v Payette
2008 WI App 106
313 Wis. 2d 39

g. Failure to establish a sufficient factual basis that Def committed the pleaded offense

3) If Def meets the burden, then

a. Ct must determine whether reasonable probability exists that different result would be reached in a trial

b. Reasonable probability of a different outcome exists if there is a reasonable probability that a jury looking at the old and new evidence would have a reasonable doubt as to guilt

Lee v US
137 SCt 1958, 1968–69
(2017)

c. Certainty of deportation makes Def's decision to proceed to trial rational; counsel's advice to plead guilty instead justifies plea withdrawal

4) Any other situation in which Def demonstrates manifest injustice

St v Negrete
2012 WI 92, ¶ 20
343 Wis. 2d 1
See St v Bentley
201 Wis. 2d 303 (1996)

a. If plea hearing transcript is unavailable, *Bentley*-type plea withdrawal standard governs. *See also infra* **Sec. 3.G.**

C. Withdrawal on ground of denial of constitutional rights

Hatcher v St
83 Wis. 2d 559 (1978)
Edwards v St
51 Wis. 2d 231 (1971)
St v Harris
2003 WI App 144
266 Wis. 2d 200
aff'd, 2004 WI 64
272 Wis. 2d 80
St v Sturgeon
231 Wis. 2d 487
(Ct. App. 1999)

1) To withdraw plea as matter of right, Def has burden to show

a. Violation of a relevant constitutional right, and

b. Violation caused Def to plead guilty, and

c. At time of plea, Def unaware of potential constitutional challenges to State's case because of the violation

St v Rock
92 Wis. 2d 554 (1979)

2) Ct must make findings on all three elements of Def's burden in granting or denying motions

St v Van Camp
213 Wis. 2d 131 (1997)
Edwards v St
51 Wis. 2d 231 (1971)

3) Plea cannot be invalidated on grounds that each constitutional right not specifically waived, provided

a. Def knows those constitutional rights automatically waived by guilty plea, and

b. Record shows plea knowingly and voluntarily entered

St v Bangert
131 Wis. 2d 246 (1986)

D. Withdrawal on grounds of violation of § 971.08 (acceptance of guilty pleas) or failure to follow Ct-mandated duties set forth in *Bangert*

St v Van Camp
213 Wis. 2d 131 (1997)
St v Hampton
2002 WI App 293
259 Wis. 2d 455
aff'd, 2004 WI 107
274 Wis. 2d 379

1) Initial burden on Def to make prima facie showing of violation, then Def is entitled to an evidentiary hearing

St v Howell
2007 WI 75, ¶ 27
301 Wis. 2d 350

a. Def must allege that Circuit Ct did not fulfill its plea colloquy duties

St v Finley
2016 WI 63, ¶ 39 n24
370 Wis. 2d 402

b. Def must allege he or she did not know or understand the information that should have been provided at the plea hearing

St v Johnson
2012 WI App 21, ¶¶ 12–13, 339 Wis. 2d 421

2) Small deviation from Ct's duties in plea colloquy (e.g., failing to inform Def that Ct not bound by plea agreement) does not require evidentiary hearing and is evaluated under "manifest injustice" standard

3) Burden then shifts to State to show by clear and convincing evidence that plea knowingly, voluntarily, and intelligently entered despite inadequacy of record at time of plea's acceptance

St v Lopez
196 Wis. 2d 725
(Ct. App. 1995)

a. Evidence outside plea hearing records is admissible

St v Thomas
2000 WI 13
232 Wis. 2d 714

b. Ct may look at totality of circumstances

St v Fuerte
2017 WI 104, ¶ 42
378 Wis. 2d 504

4) Ct's failure to give deportation warning under § 971.08(1)(c) is subject to the "harmless error" analysis

St v Carter
131 Wis. 2d 69 (1986)

5) Violation of § 971.08 not a constitutional violation but a statutory violation subject to postconviction motion to withdraw plea under § 974.02 or § 809.30. Alleged statutory violation is beyond scope of a § 974.06 postconviction motion

St v Finley
2016 WI 63, ¶ 95
370 Wis. 2d 402
St v Bollig
2000 WI 6, ¶ 16
232 Wis. 2d 561

6) Def may withdraw plea if not notified of all potential punishments resulting from plea

St v Muldrow
2018 WI 52, ¶ 1
381 Wis. 2d 492
St v Bollig
2000 WI 6, ¶ 16
232 Wis. 2d 561

a. Direct consequence has a definite, immediate, and largely automatic effect on range of punishment

St v LeMere
2016 WI 41, ¶ 31
368 Wis. 2d 624

b. Collateral consequences are those that "do not flow from the conviction" but are imposed by another tribunal

St v Fugere
2019 WI 33
386 Wis. 2d 76
St v Muldrow
2018 WI 52, ¶ 1
381 Wis. 2d 492

c. Use intent-effects test to determine whether consequence is direct or collateral

E. Review of voluntariness of plea bargain

St v Rodriguez
221 Wis. 2d 487
(Ct. App. 1998)

1) Def's unreasonable mistaken belief of own citizenship does not entitle Def to reopen plea

Seybold v St
61 Wis. 2d 227 (1973)

2) When reviewing voluntariness of plea bargain, Ct must distinguish between

a. Motivation that induces Def to plead guilty or no contest, and

b. Force that compels Def to plead guilty or no contest

Craker v St
66 Wis. 2d 222 (1974)

3) Self-imposed coercive elements do not vitiate voluntary nature of a guilty plea

St v Lichty
2012 WI App 126
344 Wis. 2d 733

4) Good-faith error in calculating maximum sentence at plea hearing, if later corrected at sentencing to Def's benefit, does not affect voluntariness

St v Fugere
2019 WI 33
386 Wis. 2d 76

5) In NGI proceedings, safeguards for a valid plea only apply to the guilt phase

F. Trial Ct's power on review of motion to withdraw plea

Broadie v St
68 Wis. 2d 420, 423
(1975)
St v Johnson
105 Wis. 2d 657
(Ct. App. 1981)

1) Test of record

a. Ct may not upset earlier findings, made in accepting plea, which provide sufficient basis to support plea, unless findings appear on review to be contrary to great weight and clear preponderance of evidence

Birts v St
68 Wis. 2d 389, 395–96
(1975)

2) Ct not bound to accept parties' stipulation to re-open plea

a. When Def moves for withdrawal of plea, Ct not bound to accept prosecutor's and Def's stipulation as to mistaken basis for Def's plea

b. Plea bargain process involves the public interest and truth should be found by trier of fact

St v Pohlhammer
82 Wis. 2d 1 (1978)

3) Withdrawal of pleas to charges barred by statutes of limitation

a. Def may withdraw plea of guilty upon motion to Ct, when

- Def pleaded guilty pursuant to plea bargain based on amended information, and
- Amended information charged new and different offense, which on its face was barred by applicable statute of limitation

G. Granting an evidentiary hearing

Nelson v St
54 Wis. 2d 489, 496
(1972)

St v Hampton
2004 WI 107, ¶ 51
274 Wis. 2d 379
See St v Bangert
131 Wis. 2d 246 (1986)

St v Hampton
2004 WI 107
¶¶ 51, 60, 63
274 Wis. 2d 379
See St v Bentley
201 Wis. 2d 303 (1996)

1) Ct's discretion to grant evidentiary hearing

a. Under *Bangert*, for assertion of failure to follow § 971.08, after Def establishes prima facie case

b. Under *Bentley*, after Ct determines that Def alleges facts that if true would entitle Def to relief

St v Howell
2007 WI 75
301 Wis. 2d 350

c. *Bangert* and *Bentley* are not inconsistent, and Def may bring dual motion under both cases. Ct should consider each alleged ground for the dual motion and may grant an evidentiary hearing on either ground

Nelson v St
54 Wis. 2d 489 (1972)

2) Basis for granting hearings

St v Bentley
201 Wis. 2d 303 (1996)
Peterson v St
54 Wis. 2d 370, 380 (1972)

a. If motion to withdraw guilty plea after judgment and sentence alleges facts that, if true, would entitle Def to relief, Ct must hold evidentiary hearing

St v Allen
2004 WI 106, ¶ 23
274 Wis. 2d 568

b. To meet *Bentley* standard, party must allege within the four corners of the motion who, what, where, when, why, and how

Levesque v St
63 Wis. 2d 412 (1974)
Nelson v St
54 Wis. 2d 489 (1972)
St v Washington
176 Wis. 2d 205
(Ct. App. 1993)

c. Evidentiary hearing not required when

- Def fails to allege sufficient facts in motion to raise question of fact, or
- Def presents only conclusory allegations, or
- Record conclusively demonstrates that Def not entitled to relief

Nelson v St
54 Wis. 2d 489 (1972)

3) Ct may, in its discretion, deny motion without a hearing, provided

a. Ct forms independent judgment after reviewing record and pleadings, and

b. Ct supports decision with written opinion

St v Hampton
2004 WI 107
¶¶ 60, 62, 63
274 Wis. 2d 379

4) Burden of proof

a. In *Bangert*-type motions, if Def presents prima facie case based on plea record, then burden shifts to State to show clear and convincing evidence that plea was knowing, voluntary, and intelligently made

b. In *Bentley*-type motions, if Def establishes prima facie case for an evidentiary hearing (usually allegations arise outside of record), then at hearing must prove by clear and convincing evidence all elements of alleged error, and the linkage between error and plea, which must amount to manifest injustice

CR 44: EXTRADITION/DETAINERS

EXTRADITION

US Const art IV, § 2
18 USC § 3182

1. Nature and Purpose of Proceedings

A. Surrender on demand by Governor of one State to Governor of another of person charged with or convicted of offense in demanding State

B. To prevent escape of person charged with or convicted of offense and to provide for return to jurisdiction from which person fled from prosecution or punishment

St ex rel Ehlers v Endicott
188 Wis. 2d 57
(Ct. App. 1994)

C. Purpose of extradition is to provide a summary and mandatory proceeding

2. Controlled by Federal Law

A. Federal extradition law

Michigan v Doran
99 SCt 530 (1978)

1) Prescribes procedure to be followed by demanding and asylum States

Mahon v Justice
8 SCt 1204 (1888)

2) Not to be construed to afford any person privilege or immunity or right of asylum in State to which fled

St v Stone
111 Wis. 2d 470 (1983)

3) Wis follows mandates of US Supreme Ct in extradition proceedings

§ 976.03

B. Uniform Criminal Extradition Act

St ex rel Foster v Uttech
31 Wis. 2d 664 (1966)

1) Legislation adopted by States ancillary to and in aid of federal Constitution and law

Appleyard v
Massachusetts
27 SCt 122 (1906)

2) Federal regulations to be liberally construed to effectuate purpose of returning fugitives

St v Hughes
68 Wis. 2d 662 (1975)
S Carolina v Bailey
53 SCt 667 (1933)
US ex rel Grano
v Anderson
318 FS 263 (D Del 1970)
aff'd, 446 F2d 272
(3d Cir 1971)

3) State law cannot set tougher standards for surrender of prisoners than those provided by federal law

§ 976.03(13)–(17)

3. Arrest Before Governor's Warrant or Requisition

A. Requirements for lawful arrest

§ 976.03(13)

1) Arrest with fugitive warrant

a. Warrant issued by Judge on complaint and affidavit of credible person that Def committed crime in another State or is fugitive from justice

St v Hughes
68 Wis. 2d 662 (1975)

b. Complaint must state sufficient facts to establish probable cause that fugitive charged with crime in another State

- Need not show probable cause that crime charged committed by Def

St v Hughes
68 Wis. 2d 662 (1975)

c. Complaint need not show, on its face, the source and reliability of facts alleged on information and belief if such showing made to Judge before issuance of warrant

§ 976.03(14)

2) Arrest without fugitive warrant

a. May be made by officer or private citizen upon reasonable information that Def charged in another State with crime punishable by death or imprisonment for term exceeding one year

Recommendation

- Reasonable information may consist of certified copy of criminal complaint and arrest warrant or telephonic or telegraphic communication from law enforcement officer or DA

St v Klein
25 Wis. 2d 394 (1964)

b. May be made by person having probable cause to believe felony committed in demanding State and Def committed it

St v Hughes
68 Wis. 2d 662 (1975)

c. Def must be taken before a Judge with all practicable speed and complaint made setting forth grounds for arrest

- Unreasonable detention without Ct appearance raises due-process questions
- Reasonableness of delay determined from all facts and circumstances

B. Initial appearance to await requisition

§ 976.03(15)

1) Ct must determine

a. Is Def here same as one charged?

b. Is Def fugitive from justice, or has Def committed act that constitutes crime in demanding State?

2) If foregoing questions answered affirmatively

§ 976.03(15)

a. Def may be committed to Cty jail not to exceed 30 days to await Governor's warrant, or

b. Def may be released on bail, unless

§ 976.03(16)

- Def charged with crime punishable by death or life imprisonment in demanding State

§ 976.03(17)

3) Commitment or bail may be extended up to 60 days if Governor's warrant not received

St ex rel Ehlers v Endicott
188 Wis. 2d 57
(Ct. App. 1994)
St ex rel Miller v Columbia Cty Sheriff
128 Wis. 2d 479
(Ct. App. 1986)

a. If Def also held on local charges, above time limits not controlling and only begin to run after detention on local charges ended

§ 976.03(27)

C. Waiver of extradition hearing

1) If arrest based on other than Governor's warrant, Def may sign written waiver to extradition at any time in presence of Judge

2) Ct must advise Def of right to

a. Counsel, and if indigent, right to Ct-appointed counsel

b. Issuance and service of warrant by Governor

c. Test warrant by habeas corpus hearing

Recommendation

3) Advise Def on record and make such inquiry of Def to establish waiver to be intelligent and voluntary

4) Copies of waiver distributed to following

§ 976.03(27)(b)

a. Governor's office

§ 976.03(27)(b)

b. Agent of demanding State

Recommendation

c. Def

Recommendation

d. Copy retained by Ct for record

4. Arrest Under Governor's Warrant or Requisition

§ 976.03(3)

A. Form of demand

1) Governor will not recognize demand unless in writing

2) Demand must allege

§ 976.03(3)

a. Def present in demanding State at time alleged crime committed

§ 976.03(6)

- Constructive presence sufficient if Def commits act in Wis that intentionally results in crime in demanding State

§ 976.03(3)

b. Def thereafter fled from demanding State

§ 976.03(3)

3) Demand must be accompanied by

a. Authenticated copy of indictment, or

b. Authenticated copy of information supported by affidavit stating underlying facts, or

c. Authenticated copy of affidavit made before magistrate, together with copy of any warrant issued thereon, or

St ex rel Clayton v Wolke
69 Wis. 2d 363 (1975)

- Cross-certification by Clerk of Ct not required

d. Authenticated copy of judgment of conviction or sentence with statement of executive authority of demanding State that Def escaped from confinement, or broke terms of parole, probation, extended supervision, or bail

St ex rel Rodencal v Fitzgerald
164 Wis. 2d 411
(Ct. App. 1991)

- Governor's warrant sufficient so long as Governor authenticates supporting documents, and in absence of showing by Def that charging documents spurious

§ 976.03(4)

B. Asylum State Governor may investigate case

1) Governor may ask AG or any DA to investigate or assist in investigation and report circumstances of Def and whether Def should be surrendered

§ 976.03(7)

C. Issuance of warrant

1) Warrant must be signed by Governor and sealed with State seal

2) Must substantially recite facts necessary to validity of issuance

§ 976.03(8)

D. Arrest on Governor's warrant

1) Def may be arrested wherever found in State

St ex rel Holmes v Spice
68 Wis. 2d 263 (1975)

2) Def held on basis of warrant

a. Any defect in prior arrest or in execution of fugitive complaint or warrant moot and cannot effect release

§ 976.03(10), (11)

3) Def taken before Judge of Ct of record before release to agent of demanding State

a. Failure to do so is crime

§ 976.03(10)

4) Judge must inform Def

a. That demand made for Def's surrender and of specific crime with which charged

People ex rel Harris v Ogilvie
221 NE2d 265 (Ill 1966)

b. Right to demand and procure Ct-appointed Atty if indigent

c. Right to test legality of arrest

- Ct must fix reasonable time to allow application for writ of habeas corpus
- When writ applied for, notify all parties of time and place of hearing
- If no writ applied for, Ct has no further jurisdiction

5) No bail provided for by statute

Recommendation

6) All proceedings should be on record

a. Not required by statute

5. Scope of Habeas Corpus Review

A. To test legality of detention under Governor's warrant of the asylum State

St v Stone
111 Wis. 2d 470, 474 (1983)
St v Ritter
74 Wis. 2d 227 (1976)
74 Yale LJ 78 (1964)

B. Asylum Ct may inquire into four questions

1) Are extradition papers in order and properly authenticated?

2) Was crime substantially charged under law of demanding State?

3) Is petitioner person named in extradition papers (identity)?

4) Was petitioner present in demanding State at time of alleged offense (fugitive status)?

C. Limitation in scope reflects conflict of two basic principles of law

1) Proper relationship between judicial processes of sister States

2) Securing for individuals constitutional rights guaranteed by 14th Amendment

Michigan v Doran
99 SCt 530 (1978)

D. Restrictions on habeas corpus review of extradition proceeding

1) Grant of extradition by asylum State's Governor prima facie evidence that constitutional and statutory requirements met

St v Stone
111 Wis. 2d 470, 474
(1983)

2) Once grant made, Ct in State considering habeas corpus release can do no more than decide whether

a. Extradition documents on their face in order

St v Towne
46 Wis. 2d 169 (1970)
St ex rel Foster v Uttech
31 Wis. 2d 664 (1966)

- Constitutional defects on face of extradition papers may affect legality of arrest in Wis

b. Petitioner charged with crime in demanding State

St v Ritter
74 Wis. 2d 227 (1976)

- Ct of asylum State may take judicial notice of statutes of demanding State to determine whether crime has been charged

St v Stone
111 Wis. 2d 470, 476
(1983)

- Wis can only inquire whether finding of probable cause made by judicial officer in demanding State

St ex rel Ehlers v Endicott
188 Wis. 2d 57
(Ct. App. 1994)

- Not necessary that complaint or arrest warrant contain an express statement of probable cause. Ct may take judicial notice of demanding State's statutory requirements

c. Petitioner is person named in extradition request

St ex rel Clayton v Wolke
69 Wis. 2d 363 (1975)

- In determining identity, presumption that fugitive is person sought by demanding State must be overcome by clear and convincing evidence

d. Petitioner is fugitive

Illinois ex rel McNichols v Pease
28 SCt 58 (1907)
St ex rel Rodencal v Fitzgerald
164 Wis. 2d 411 (1991)

E. Def has right to evidentiary hearing on claim that not fugitive from justice

Biddinger v Comm'r of Police
38 SCt 41 (1917)
St ex rel Rodencal v Fitzgerald
164 Wis. 2d 411 (1991)

1) Issue at hearing: Was Def present in demanding State at time crime alleged to have been committed?

St ex rel Kohl v Kubiak
255 Wis. 186 (1949)

2) Burden on Def to show by competent evidence that not fugitive from justice of demanding State

a. Must overcome presumption arising from extradition warrant that Def is fugitive

F. Ct should <u>not</u> consider following

§ 976.03(20)
St ex rel Welch v Hegge
54 Wis. 2d 482 (1972)

1) Guilt or innocence of Def, except as testimony relevant to issue of identity or fugitive status

St ex rel Sieloff v Golz
80 Wis. 2d 225 (1977)

2) Sufficiency of indictment

Munsey v Clough
25 SCt 282 (1905)
St ex rel Welch v Hegge
54 Wis. 2d 482 (1972)

3) Question of alibi

Drew v Thaw
35 SCt 137 (1914)

4) Motive for seeking extradition

New Mexico v Reed
118 SCt 1860 (1998)

Hogan v O'Neill
41 SCt 222 (1921)

5) Motive of Def in leaving demanding State

St ex rel Lykins v Steinhorst
197 Wis. 2d 875
(Ct. App. 1995)

6) Whether original arrest or detention was illegal

6. Findings

A. If custody found lawful, quash habeas corpus and return Def to custody of sheriff for relinquishment to demanding State under Governor's warrant

B. If custody found unlawful, discharge Def from custody

DETAINERS

1. Definition

US v Mauro
98 SCt 1834 (1978)

A. Detainer is notification

1) Filed with institution in which prisoner is serving a sentence

2) Advising that prisoner is wanted to face pending criminal charges in another jurisdiction

St v Eesley
225 Wis. 2d 248 (1999)

3) Writ of habeas corpus *ad prosequendum* is not a detainer and does not trigger the anti-shuttling (§ 976.05(4)(e)) or speedy trial (§ 976.05(4)(c)) provisions of Ch 976

St v Onheiber
2009 WI App 180
322 Wis. 2d 708

4) Nationwide arrest warrant is a detainer

B. Wis has adopted separate procedures to deal with

§ 976.05, § 976.06

1) Interstate detainers

§ 971.11

2) Intrastate detainers

§ 976.05

2. Interstate Procedure

A. Commencement

§ 976.05(4)

1) Commenced by State by filing written request for temporary custody with appropriate authorities in state of prisoner's incarceration

§ 976.05(3)

2) Commenced by prisoner by sending to prosecuting officer and appropriate Ct

a. Written notice of place of incarceration

b. Request for final disposition of charges, and

c. Certificate from appropriate authority having custody stating terms of incarceration and other dept decisions relating to prisoner

B. Time limits

§ 976.05(3)(a)
St v Miller
2003 WI App 74
261 Wis. 2d 866

1) If commenced by prisoner (voluntary request), trial must begin within 180 days after request

St v Thomas
2013 WI App 78
348 Wis. 2d 699
St v Blackburn
214 Wis. 2d 372
(Ct. App. 1997)

a. Prisoner must strictly comply with formal notice requirements

St v Townsend
2006 WI App 177
295 Wis. 2d 844

b. "Sending" State's failure to notify prisoner of detainer does not deprive prisoner of right to seek prompt disposition of charges in "receiving" State

§ 976.05(4)
St v Aukes
192 Wis. 2d 338
(Ct. App. 1995)

2) If commenced by State, trial must begin within 120 days after prisoner's arrival

St v Miller
2003 WI App 74
261 Wis. 2d 866

3) Time limits tolled if good cause shown in open Ct

St v Grzelak
215 Wis. 2d 577

(Ct. App. 1997)

4) Time limits stop running on date trial begins or no contest or guilty plea entered

St v Tarrant
2009 WI App 121
321 Wis. 2d 69

5) Time limits are not tolled merely by withdrawing the detainer or the request for extradition; case must be dismissed to stop the clock

St v Aukes
192 Wis. 2d 338
(Ct. App. 1995)

C. Any time running for the parties to pursue an appeal not included in calculating time limits

D. Hearing

§ 976.06

1) Prisoner entitled to hearing within 30 days after receipt of request

St v Sykes
91 Wis. 2d 436
(Ct. App. 1979)

a. Failure to hold hearing within time specified should result in prisoner's release from the detainer

Aiello v St
166 Wis. 2d 27
(Ct. App. 1991)

b. However, § 976.06 does not proscribe the filing of multiple detainers

§ 976.05(4)(a)
St ex rel Kerr
v McCaughtry
183 Wis. 2d 54
(Ct. App. 1994)

c. If hearing not held within 30 days, DA must again obtain necessary documentation that Ct having jurisdiction of such indictment has approved, recorded, and transmitted the request

§ 976.06

2) Scope of hearing confined to request for temporary custody and identity of person sought by requesting State

a. Shall not consider guilt or innocence of prisoner

§ 976.05(4)(e)
Alabama v Bozeman
121 SCt 2079 (2001)

E. The literal language of the anti-shuttling provision of the Interstate Agreement on Detainers bars any further criminal proceedings when Def returned to original place of imprisonment before trial

St v Nonahal
2001 WI App 39
241 Wis. 2d 397

1) Protections of anti-shuttling provision may be waived

3. Intrastate Detainer Procedure

§ 971.11

A. Procedures substantially similar to procedures on Interstate detainers

1) Applies to inmates of a State prison

2) Upon request of inmate, warden must send demand for prompt disposition of pending criminal case to DA

3) DA must bring case on for trial within

a. 120 days after receipt of request in felony charge

b. 90 days after receipt of request in misdemeanor charge

St v Davis
2001 WI 136
248 Wis. 2d 986
St v Lewis
2004 WI App 211
277 Wis. 2d 446

B. Ct has discretion to dismiss with or without prejudice for noncompliance with time limit

CR 45: ELECTRONIC SURVEILLANCE

1. Constitutionality

St ex rel Hussong
v Froelich
62 Wis. 2d 577 (1974)

A. Electronic surveillance control law valid enactment that meets 4th Amendment and all other constitutional requirements

St v Gil
208 Wis. 2d 531
(Ct. App. 1997)

B. Surveillance control law premised on concept of controlling law enforcement's conduct to protect citizens' privacy rights

St v House
2007 WI 79
302 Wis. 2d 1

2. Procedure

A. Application

§ 968.28

1) Approval of both AG and any DA (generally DA in Cty where criminal investigation pending) necessary

§ 968.28

2) Made to Chief Judge of Judicial Administrative District in Cty where interception to occur

§ 968.28

3) Authorization limited to interception that may provide or has provided evidence of commission of

a. Homicide

b. Felony murder

c. Kidnapping

d. Commercial gambling

e. Bribery

f. Extortion

g. Dealing in controlled substances or controlled substance analogs

h. Computer crime that is felony under § 943.70

i. Sexual exploitation of a child

j. Child trafficking

k. Child enticement

l. Use of a computer to facilitate child sex crime

m. Soliciting a child for prostitution

n. Any conspiracy to commit foregoing offenses

§ 968.30

4) Must be upon oath or affirmation

§ 968.30(1)
St ex rel Hussong v Froelich
62 Wis. 2d 577 (1974)

B. Contents of application must conform to statute, including

§ 968.30(1)(a)

1) Identity of applicant and persons authorizing applicant to make application

§ 968.30(1)(b)

2) Full and complete statement of facts and circumstances justifying applicant's belief order should issue, including

§ 968.30(1)(b)1.

a. Details of particular offense

§ 968.30(1)(b)2.

b. Particular description of nature and location of facilities from which communication to be intercepted or particular description of nature and location of place where communication to be intercepted

§ 968.30(1)(b)3.

c. Particular description of type of communications sought to be intercepted

§ 968.30(1)(b)4.

d. Identity of person, if known, committing offense and whose communications to be intercepted

§ 968.30(1)(c)

3) Full and complete statement of other investigative procedures tried and failed

a. Why other investigative procedures reasonably appear unlikely to succeed, if tried

b. Why other investigative procedures reasonably appear too dangerous

§ 968.30(1)(d)

4) Statement of time required for interception to be maintained

a. If interception does not automatically terminate when described communication obtained, particular description of facts establishing probable cause to believe additional described communications will occur

§ 968.30(1)(e)

5) Full and complete statement of facts concerning all previous applications involving any of same persons, facilities, or places known to applicant, including

a. Ct to which previous applications made

b. Action taken by Ct on each previous application

§ 968.30(1)(f)

6) When application for extension of time for interception to be maintained

a. Statement of results thus far obtained by interception, or

b. Reasonable explanation of failure to obtain objective

C. Hearing

§ 968.30(2)

1) May be required to support application

§ 968.30(2)

2) If held, oral testimony must be reduced to writing

D. Order

§ 968.30(3)

1) Must be supported by findings showing probable cause that

§ 968.30(3)(a), § 968.28
St ex rel Hussong v Froelich
62 Wis. 2d 577 (1974)

a. Person committing, committed, or about to commit homicide, felony murder, kidnapping, commercial gambling, bribery, extortion, dealing in controlled substances (or controlled substance analogs), computer crime that is felony under § 943.70, sexual exploitation of a child, child trafficking, child enticement, use of a computer to facilitate child sex crime, soliciting a child for prostitution, or any conspiracy to commit foregoing offenses

§ 968.30(3)(b)

b. Evidence concerning offense will likely be obtained through interception

§ 968.30(3)(d)

c. Communication facilities used or about to be used in connection with offense, or leased by, listed in name of, or commonly used by, person suspected

§ 968.30(3)(c)

d. Other investigative procedures tried and failed, or appear unlikely to succeed or too dangerous

§ 968.30(4)

2) Contents of order must comply with statute

§ 968.27(4)(a)
St v Smith
149 Wis. 2d 89 (1989)

a. Radio portion of cordless telephone communication transmitted between handset and base unit not protected by statute

§ 968.30(9)(b)2.

3) State may appeal order denying application

E. Time period of authorization

§ 968.30(5)

1) Cannot exceed 30 days without judicial extension

a. 30-day period begins on earlier of

- Day on which interception under order begins, or

- 10 days after order entered

§ 968.30(5)

2) Extension only granted upon application and cannot exceed 30 days

§ 968.30(6)

3) Ct may require progress reports

§ 968.30(7)

3. Recording Interceptions

§ 968.30(7)(a)

A. If possible, recorded on tape, wire, or comparable device

1) In way that will protect recording from alteration or editing

§ 968.30(7)(b)

B. Recording filed with Ct issuing order, sealed, and kept in Ct's custody

§ 968.30(7)(a)

C. Preserved for 10 years and destroyed only on order of issuing Judge

§ 968.30(7)(b)
§ 968.29(1), (2)

D. No disclosure except by order of Ct for good cause

E. Concealed radio transmitters may be used

US v Knotts
103 SCt 1081 (1983)

1) Technological enhancement of usual surveillance techniques raises no constitutional issue visual surveillance would not also raise

US v Karo
104 SCt 3296 (1984)

a. Beepers may not be used to monitor activities inside private residence without warrant

§ 968.30(7)

4. Inventory (Notice) to Person Monitored

§ 968.30(7)(d)

A. Served on persons named in order or application and other parties to interception

B. Service within 90 days after filing of application or termination of period of order or extension(s) thereof

C. Contents of inventory

§ 968.30(7)(d)1.

1) Fact of entry of order or application

§ 968.30(7)(d)2.

2) Date of order and period of authorization or denial of application

§ 968.30(7)(d)3.

3) Whether wire, electronic, or oral communications intercepted

§ 968.30(7)(e)

4) On ex parte showing of good cause, Judge may postpone serving inventory

a. Shall review postponement at end of 60 days, and

b. Good cause must be shown before further postponement

§ 968.30(7)(e), (9)(a)

5) Inspection of intercepted communication and application

a. Limited to what Judge determines to be in interest of justice

§ 968.29(2)
St v Gilmore
201 Wis. 2d 820 (1996)

5. Pretrial Use of Intercepted Communications

A. Prosecutor may include contents of legally intercepted communications in criminal complaint

1) State must file complaint under seal

St v House
2007 WI 79
302 Wis. 2d 1

6. Trial Use of Intercepted Communications

§ 968.30(8)

A. Parties must be furnished with copy of Ct order and application at least 10 days before trial, hearing, or proceeding

§ 968.30(8)

B. Judge may waive notice, if

1) Impossible to furnish information within 10-day period, and

2) Party not prejudiced by delay in receiving information

§ 968.30(9)

C. Motion to suppress intercepted communication (or evidence derived from the communication) may be made before trial on following grounds

§ 968.30(9)(a)

1) Communication illegally intercepted

St v Smith
149 Wis. 2d 89 (1989)

a. Person using cordless phone has no reasonable expectation of privacy in conversation

b. Party using normal landline phone may well have expectation of privacy when unknowingly conversing with another using cordless phone

§ 968.30(9)(a)

2) Order of authorization or approval insufficient on its face

§ 968.30(9)(a)

3) Interception not made in conformity with order of authorization or approval

St v Maloney
161 Wis. 2d 127
(Ct. App. 1991)

a. Even though statutory requirements for recording telephone conversation violated, so long as witness's receipt of communication does not rely on intercept, witness may testify from personal experience and recollection of conversation

§ 968.30(9)(b)1.

D. State has right to appeal from order suppressing intercepted communications

1) Shall certify that appeal not for purposes of delay

7. Effect of Consent of One Party to the Communication

§ 968.29(3)(b)

A. Recorded (intercepted) one-party consent communication may be disclosed in any felony Ct proceeding

St v Gil
208 Wis. 2d 531
(Ct. App. 1997)

B. EXCEPT when plain hearing doctrine applies

1) When officers are conducting otherwise-authorized electronic, aural surveillance (warrant or one-party consent felony surveillance), evidence of other crime not otherwise subject to authorized electronic, aural surveillance may be used in case-in-chief if the evidence inadvertently fell within officers' plain hearing

2) Ct must be certain that law enforcement just inadvertently came upon evidence

St v Waste Mgmt
81 Wis. 2d 555 (1978)

C. In non-felony proceedings, evidence obtained from one-party consent search cannot be admitted in evidence in case-in-chief, but can be turned over to law enforcement officials

US v Caceres
99 SCt 1465 (1979)
St ex rel Arnold v Cty Ct
51 Wis. 2d 434 (1971)
US v White
91 SCt 1122 (1971)

D. Intercepted recorded conversation with consent of one party not violative of federal Constitution

St v Christensen
2007 WI App 170
304 Wis. 2d 147
St v Riley
2005 WI App 203
287 Wis. 2d 244

1) Consent may be implied

2) Jail inmate who is given meaningful notice that institutional phone calls are subject to surveillance implicitly consents to surveillance by engaging in conversation on such phones

St v Turner
2014 WI App 93
356 Wis. 2d 759

3) Minor may consent so long as consent is voluntary

St v Smith
72 Wis. 2d 711 (1976)

E. Testimony concerning content of tape recording is admissible

St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)

1) Def can "open door" to tape's admission through extensive reference to transcript of recording during examination

St v Smith
72 Wis. 2d 711 (1976)
St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)

2) Tape can be admitted as "defensive impeachment evidence" in rebuttal, to

a. Present the "tone" in which statements were made

b. Provide other nuances not readily ascertainable from transcript

CR 46: WRITS

1. Certiorari: *See Civil Benchbook* CV 26

2. Habeas Corpus: *See Civil Benchbook* CV 27

CR 47: CONTEMPT OF COURT

1. Power of Court

In re Kading
70 Wis. 2d 508, 543b
(1975)

A. Ct of general jurisdiction has inherent power to hold those who disobey its lawful order in contempt

DLD v Circuit Ct
(Int of DLD)
110 Wis. 2d 168, 182
(1983)

1) To be used sparingly, with utmost sensitivity

Currie v Schwalbach
132 Wis. 2d 29, 44
(Ct. App. 1986)

2) Not to be used arbitrarily, capriciously, or oppressively

St v Carpenter
179 Wis. 2d 838
(Ct. App. 1993)
McGee v
Racine Cty Cir Ct
150 Wis. 2d 178
(Ct. App. 1989)
66 MLR 369 (1983)

3) Contempt proceedings are sui generis and are neither civil nor criminal prosecutions within the ordinary meaning

a. Punitive contempt may not be considered a conviction for § 939.62 penalty enhancement

4) Appellate Cts carefully scrutinize contempt findings on review

McGee v
Racine Cty Cir Ct
150 Wis. 2d 178
(Ct. App. 1989)

B. Ct's power subject to reasonable legislative regulation and limitation

Comment

1) Statutory contempt proceedings under Ch 785 do not preclude specific remedies in other statutes

2) Broad statutory construction intended

Recommendation

3) Violations of pretrial discovery, scheduling orders and the like should be handled by sanctions provided as specific remedies in statutes outside Ch 785

C. Juvs may be held in contempt

DLD v Circuit Ct
(Int of DLD)
110 Wis. 2d 168 (1983)
St v Aaron D
(Int of Aaron D)

214 Wis. 2d 56
(Ct. App. 1997)
BLP v Circuit Ct
(In re BLP)
118 Wis. 2d 33
(Ct. App. 1984)

1) Juv Ct must follow Ch 785 procedures, except as limited by Ch 938

2) See **JV 11, Postdisposition, Juvenile Benchbook**

2. Definition of Contempt

§ 785.01(1)(a)
St v VanLaarhoven
90 Wis. 2d 67
(Ct. App. 1979)

A. Intentional misconduct in presence of Ct

1) Intentional

Shepard v
Cir Ct of Outagamie Cty
189 Wis. 2d 279
(Ct. App. 1994)

a. Def appearing intoxicated at time of criminal plea and sentencing hearing is engaging in intentional misconduct and can be sanctioned by summary contempt

2) Misconduct

Currie v Schwalbach
132 Wis. 2d 29
(Ct. App. 1986)

a. Interferes with Ct proceeding

b. Interferes with administration of justice

c. Impairs respect due Ct

§ 785.01(1)(b)
In re Kading
70 Wis. 2d 508 (1975)

B. Disobedience, resistance, or obstruction of authority, process, or order of Ct

St v Dickson
53 Wis. 2d 532 (1972)

1) Notice from Clerk of Ct not order of Ct

2) Although sanctions for failure to comply with scheduling, discovery, or pretrial orders can be found in specific statutes, disobedience of order compelling compliance may be punishable by contempt

St v Chinavare
185 Wis. 2d 528
(Ct. App. 1994)

3) Contempt may be charged for violation of Ct order for acts committed by a third party at direction of Def

§ 785.01(1)(c)

C. Refusal of witness to appear, be sworn, or answer question

§ 972.08(1)
St v Gonzalez
172 Wis. 2d 576
(Ct. App. 1992)

1) To be punished with § 972.08(1) sanctions for failure to testify "at trial," the trial—not a pretrial hearing—must have commenced

a. However, § 972.08(1) says, "Whenever any person refuses to testify … when required to do so before any grand jury, in a proceeding under s. 968.26 or at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court on motion of the district attorney…"

Recommendation

- In making record, clarify nature of proceeding

§ 785.01(1)(d)

D. Refusal to produce record, document, or other object

3. Summary Proceedings

§ 785.03(2)
Anderson v
Milw Cty Cir Ct
219 Wis. 2d 1 (1998)
Oliveto v
Crawford Cty Cir Ct
194 Wis. 2d 418 (1995)
Casey v Carlson
146 Wis. 2d 166
(Ct. App. 1988)

A. Requirements for using summary contempt powers

1) Contemptuous act must be committed in actual presence of Ct

Gower v Cir Ct
154 Wis. 2d 1 (1990)

a. Failure to appear not basis for summary contempt because it does not occur in presence of Ct

b. Tardiness of counsel does not occur in presence of Ct and cannot be sanctioned by summary contempt

§ 785.03(2)

2) Sanction must be imposed to preserve order in Ct

3) Sanction must be imposed to protect authority and dignity of Ct

4) Sanction must be imposed immediately after contempt

Lemmons v
Racine Cty Cir Ct
148 Wis. 2d 740
(Ct. App. 1989)

a. Contemnor's immediate voluntary departure from presence of Ct does not defeat ability of Ct to act as soon as reasonably possible to punish the contempt

B. In general

1) Need for expediency justifies disposal of fundamental and routine rights, including notice of charges, presumption of innocence, prosecutorial burden of proof, trial by jury, right to counsel, and confrontation of accusers

St v VanLaarhoven
90 Wis. 2d 67
(Ct. App. 1979)

2) Summary contempt should not be used if Judge attacked such that personal feelings could reasonably be expected to have been affected, unless absolutely necessary to preserve order and protect authority and dignity of Ct

§ 785.03(2)
Comment

3) When Ct proceeds summarily, may not proceed with further punitive sanctions

§ 785.04(3)

4) If contemptuous conduct continuing, remedial action may be commenced even though summary proceeding used

§ 785.03(2)

C. Procedure

1) Must be done immediately following contemptuous conduct

Oliveto v
Crawford Cty Cir Ct
194 Wis. 2d 418 (1995)

2) Offender has right of allocution

3) Offender brought before Ct, findings made, and penalty imposed

D. Ct must make specific findings

1) (Date)(Time) Branch _____, _____ County Circuit Court being in regular session; and

2) (Name of action)(Case no.) being then on trial before the Court/jury; and

3) (Name of contemnor) did then and there, in open Court, in the immediate view of and in the presence of the Court (and jury), engage in disorderly, contemptuous, and insolent behavior, directly tending to interrupt the Court's proceedings and to impair the authority and dignity of this Court; and

4) In that said (name of contemnor) did: (Specify each contemptuous act); and

5) The disorderly, contemptuous, and insolent behavior of (name of contemnor) has, beyond a reasonable doubt, seriously destroyed the order, authority, and dignity of this Court and must be dealt with under the Court's inherent and statutory powers to summarily punish such conduct

§ 785.04(2)(b)

E. Sanctions available

1) Fine of not more than $500

2) Or, confinement in Cty jail

a. Not to exceed 30 days

§ 785.07

b. Confinement order must be issued by a Judge

3) Or both

4. Non-Summary Proceedings

A. Remedial sanctions

1) Definition

§ 785.01(3)

a. Sanction imposed for purpose of terminating continuing contempt of Ct

St ex rel NA v GS
156 Wis. 2d 338
(Ct. App. 1990)

- If sanction is imprisonment, must be conditional upon contemnor's performing act that ends sentence and results in contemnor's discharge

- Purge order must clearly spell out what contemnor must do to purge

Larsen v Larsen
159 Wis. 2d 672
(Ct. App. 1990)

- Purge condition must be related to cause or nature of contempt

- Required action must be within power of contemnor

- Contemnors must "hold the keys to their own jails"

§ 785.03(1)(c)

b. May be tried jointly with punitive action

2) Standing

§ 785.03(1)(a)
St v King
82 Wis. 2d 124 (1978)

a. Any person aggrieved by contempt of Ct has standing to file motion for remedial sanction in principal proceeding

§ 785.06

b. Ct Comm'r, Municipal Ct, or State agency conducting proceeding may petition Circuit Ct for sanction for contemptuous conduct at such proceeding

c. If contemnor not party to principal proceedings

- May be joined under § 803.06

Recommendation

- Limit to remedial sanction proceedings only

Evans v Luebke
2003 WI App 207
267 Wis. 2d 596

3) Procedure

a. Ct must give notice to alleged contemnor

Upper Lakes Shipping v Seafarers' Union
23 Wis. 2d 494 (1964)

b. Ct must conduct evidentiary hearing

- Before Judge

- Without jury

c. Alleged contemnor entitled to counsel

4) Findings and conclusions

a. Alleged contemnor committing certain acts or omissions, and

b. Acts or omissions intentional, contemptuous, and without legal justification

Balaam v Balaam
52 Wis. 2d 20 (1971)

5) Alleged contemnor's burden, after proof of conduct

a. Must prove acts or omissions not contemptuous, or

b. Must prove legal justification for conduct

§ 785.04(1)

6) Sanctions available

a. Payment of money sufficient to compensate injured party

b. Forfeiture not to exceed $2,000 per day for each day contempt continues

c. Order designed to ensure compliance with prior order

§ 785.04(1)(b)

d. Confinement

- Not to exceed 6 months or until contemnor complies, whichever is less

§ 785.07

- Order for confinement must be issued by a Judge

- Proper when conduct involved disobedience of Ct order, or refusal to appear, testify, or produce a record, a document, or an object

§ 785.05

- Not proper when conduct involved failure to appear/pay nonmoving traffic violation

§ 785.04(1)(e)

e. Any other sanction if Ct finds foregoing would be ineffectual

f. No remedial sanction may be imposed unless conduct continuing at time of sanction

Recommendation

g. Consider option of imposing sanction with right to purge in specified time

B. Punitive sanctions

1) Definition

§ 785.01(2)

a. Sanction imposed to punish past contemptuous conduct

St ex rel NA v GS
156 Wis. 2d 338
(Ct. App. 1990)

- Sentence of imprisonment for definite period is punitive sanction

- Contemnor cannot undo or remedy what has been done and cannot shorten term by promising not to repeat offense

§ 785.04(3)

b. Can be imposed for past conduct even though similar present conduct continuing contempt

§ 785.03(1)(b)

2) Procedure

a. Initiated by filing criminal complaint

- Commenced only by AG, DA, or Special Prosecutor

- May be requested by aggrieved party, Judge, or at prosecutor's own initiative

§ 785.06

- Ct Comm'r, Municipal Ct, or State agency conducting proceeding may petition Circuit Ct for sanction for contemptuous conduct at that proceeding

b. Complaint to recite sanction sought and alleged contemptuous conduct

c. Alleged contemnor entitled to due process

St v King
82 Wis. 2d 124 (1978)
Ferris v
St ex rel Maass
75 Wis. 2d 542 (1977)

- Trial and proceedings same as for any criminal case

St v King
82 Wis. 2d 124 (1978)

- Burden on State to prove guilt beyond a reasonable doubt

§ 785.03(1)(b)

d. If conduct involved disrespect or criticism of Judge, same Judge disqualified from presiding, unless Def consents

3) Findings and conclusions

a. Def intentionally committed certain acts or omissions, and

b. Acts or omissions were contemptuous

§ 785.04(2)(a)

4) Sanctions available

a. Fine of not more than $5,000

b. Or, confinement in Cty jail

- Not to exceed 1 year

§ 785.07

- Order for confinement must be issued by a Judge

§ 785.05

- Def cannot be confined if contempt based on failure to appear or pay for nonmoving traffic violation

§ 785.04(2)(a)

c. Or both

CR 48: GRAND JURY/JOHN DOE PROCEEDINGS

GRAND JURY

Report of
Grand Jury: Williams
204 Wis. 409 (1931)

1. Purpose

Report of
Grand Jury: Williams
204 Wis. 409 (1931)

A. To discover wrongdoing and, upon sufficient evidence, to accuse individuals by indictment so that proper prosecution of offenders may occur

B. Investigates whether crime committed and by whom

2. Powers

US v Morton Salt Co
70 SCt 357 (1950)

A. Prosecution may investigate merely on suspicion that law being violated

B. May investigate just because Grand Jury wants assurance that law not being violated

US v Dionisio
93 SCt 764 (1973)

C. Free to pursue investigations unhindered by external influence or supervision

1) So long as it does not infringe on legitimate rights of any witness called before it

St v Nowakowski
67 Wis. 2d 545 (1975)

D. Grand Jury convened to investigate allegations of criminality against specific person does not deny that person due process

3. Convening

A. DA usually makes written application or petition containing

1) Description of nature of suspected criminal activity

2) Why criminal activity suspected

3) Prayer that Judge issue order for Grand Jury

§ 968.40(1)

B. Written order entered by Judge to Clerk of Circuit Ct requiring Clerk to select Grand Jury panel list within specified reasonable time

§ 968.40(1)

1) Panel list no fewer than 75 nor more than 150 members

§ 968.40(3), (4)

2) Statutory procedures followed

§ 968.40(4)

3) 17 members constitute jury

§ 968.48

4) No business may be transacted unless 14 jurors in attendance

§ 968.40(6)

C. Grand jurors serve for 31 consecutive days

1) May serve additional days, if necessary to complete service in particular proceeding

§ 968.40(6)

2) May be discharged by Judge at any time

4. Participants

A. Judge orders jurors summoned and supervises

§ 968.47

B. DA has duty to attend whenever required by Grand Jury

§ 968.40(3)

1) Examines panel members under oath or affirmation about qualifications to serve

§ 968.47

2) Examines witnesses

3) Gives advice on legal matters

4) Issues subpoenas and other process to bring witnesses before Grand Jury

5) Draws bills of indictment

§ 968.42

C. Grand Jury selects presiding juror and clerk

§ 968.43(1)

D. Employs one or more reporters

1) To attend sessions

2) To make and transcribe verbatim record of all proceedings

5. Secrecy

Butterworth v Smith
110 SCt 1376 (1990)

A. Grand Jury proceedings may be secret during pendency of proceedings

1) Interest served by secrecy

a. Prospective witnesses less hesitant to come forward voluntarily

b. Witnesses less vulnerable to retribution or inducements in testimony

c. Reduces risk that targets of investigation will flee or try to influence individual Grand Jury members

d. Exonerated persons not exposed to public ridicule

St v Unnamed Def
150 Wis. 2d 352 (1989)
St ex rel Steven v Cir Ct
141 Wis. 2d 239 (1987)

2) CAUTION: Wis has presumption that Ct proceedings open to public; therefore any order for secrecy should properly balance any compelling need for secrecy against public interest in open proceedings

§ 968.41
§ 968.43(2)

3) Grand jurors and reporters must take oath or affirmation of secrecy

§ 968.44

4) Oath or affirmation of secrecy administered by presiding juror or DA to witnesses before testifying

Butterworth v Smith
110 SCt 1376 (1990)

5) After term of Grand Jury ended, witness may not constitutionally be prohibited from disclosing own testimony

St v
Waste Mgmt of Wis, Inc
81 Wis. 2d 555, 578
(1978)

B. Grand Jury proceedings need not be recorded, unless so ordered at direction of Judge

6. Witnesses

A. Usually subpoenaed

§ 968.44

B. Sworn to secrecy and to tell truth by DA or presiding juror

US v Dionisio
93 SCt 764 (1973)

C. Subpoena to appear not seizure within meaning of 4th Amendment even though inconvenient or burdensome

US v Dionisio
93 SCt 764 (1973)
St v Knops
49 Wis. 2d 647 (1971)

1) No person has justifiable expectation of immunity from Grand Jury subpoena

US v Dionisio
93 SCt 764 (1973)

2) 4th Amendment does provide protection from subpoena *duces tecum* too sweeping in terms to be reasonable

D. Witness has absolute duty to answer all questions, subject only to

US v Mandujano
96 SCt 1768 (1976)

1) Valid 5th Amendment privilege against self-incrimination

Ch 905

2) Valid statutory privilege

E. Claim of privilege against self-incrimination

Maness v Meyers
95 SCt 584 (1975)

St ex rel Rizzo v Cty Ct
32 Wis. 2d 642 (1966)

1) Personal privilege against self-disclosure that witness reasonably believes could be used in criminal prosecution against the witness or could lead to other evidence that might be so used

Doe v US
108 SCt 2341 (1988)
St v Gonzalez
2014 WI 124
359 Wis. 2d 1

2) Does not prohibit compelling witness to provide physical evidence that does not have a testimonial aspect

St ex rel Rizzo v Cty Ct
32 Wis. 2d 642 (1966)

3) Does not bar testimony about criminal acts barred by statute of limitation

Braswell v US
108 SCt 2284 (1988)
St v Alioto
64 Wis. 2d 354 (1974)

4) Does not protect books and records of "collective entities" like partnerships, corporations, and banks

Doe v US
108 SCt 2341 (1988)

a. Accused can be compelled to sign nonspecific consent for release of documents without violating 5th Amendment privilege against self-incrimination

- Signing not testimonial in nature, so long as form does not acknowledge existence or accused's control over account

Fisher v US
96 SCt 1569 (1976)

5) Does not protect documents in possession of agent

6) Privilege must be claimed

St v Hall
65 Wis. 2d 18, 28 (1974)

a. If privilege not claimed and witness gives testimony without compulsion by Ct to testify, witness not immune from prosecution

St v Hall
65 Wis. 2d 18, 28 (1974)

7) If witness claims privilege, cannot be compelled to answer question, unless granted immunity from prosecution

a. Questioning need not cease

b. Any further questions can be refused on grounds of privilege

F. Compelling testimony/grant of immunity

§ 972.08(1)

1) If witness takes 5th Amendment, may nonetheless be compelled to testify or produce such evidence by order of Ct on motion of DA

Hebel v St
60 Wis. 2d 325, 330
(1973)
Shelley v St
89 Wis. 2d 263, 277
(Ct. App. 1979)

a. Ct has no discretion to grant immunity without motion by DA

St ex rel Newspapers Inc
v Cir Ct
65 Wis. 2d 66 (1974)

2) Order granting or denying motion to compel must be made in open Ct

St ex rel Newspapers Inc
v Cir Ct
65 Wis. 2d 66 (1974)

a. Details of DA's motion (such as questions witness to be compelled to answer) should not be recited in open Ct

b. State only that DA made a motion to compel testimony (or produce record) of named witness and that motion granted or denied

§ 972.08(1)
US v Mandujano
96 SCt 1768 (1976)

3) If witness then answers, not liable for any forfeiture or penalty for or on account of any transaction, matter, or thing concerning which witness testifies

§ 972.08(1)

a. Witness not exempt from prosecution and punishment for perjury or false swearing committed while testifying

§ 972.08(2)

4) Upon witness's continued refusal, Ct may summarily order confinement until witness willing to give testimony or until Grand Jury term concluded, but in no case exceeding 1 year

§ 972.08(2)

a. No bail pending determination of appeal taken from order of confinement

G. Right to Counsel

§ 968.45(1)

1) Witness may retain, confer with, and receive legal advice and assistance of counsel

2) Not entitled to presence of Atty while giving testimony before Grand Jury

St v Hall
65 Wis. 2d 18 (1974)

3) Witness may confer with Atty outside Grand Jury room before deciding whether to answer questions that may tend to be self-incriminating

§ 976.02(3)

H. Witness may be extradited to Wis to testify from another state that is a party to the Uniform Act for Extradition of Witnesses in Criminal Actions

7. Indictment

Black's Law Dictionary
891 (10th ed 2014)

A. Indictment is formal accusation of a crime, presented to a Ct for prosecution against accused person

1) In writing

2) Found by Grand Jury legally convoked and sworn

3) Presented to Ct in which Grand Jury empaneled

St ex rel Welch v
Waukesha Cty Ct
52 Wis. 2d 221 (1971)

B. Indictment properly returned when evidence presented excites in jury's mind, after careful consideration, honest, reasonable belief that accused committed offense charged

§ 968.48

C. Indictment must be agreed to by at least 12 jurors

§ 968.06

D. Upon indictment, complaint issued

1) All proceedings thereafter same as if person charged under § 968.02 as normally done

§ 971.02(1)

E. No indictment charging a felony may be filed until noncorporate Def has had prelim

1) Def may waive prelim in writing or in open Ct

JOHN DOE PROCEEDINGS

NOTE: 2015 Wis. Act 64, effective 10/25/15, made a variety of changes to the statutes governing John Doe proceedings, including the following: prohibits John Doe proceedings for certain criminal violations and generally limits the scope of proceedings; prohibits reserve Judges from conducting John Doe proceedings; specifies who may be covered by a secrecy order; generally limits a proceeding to six months; and provides that a search warrant in a proceeding must be issued by a Judge other than the presiding Judge.

1. Definition and Initiation

§ 968.26(1b)(a)
St v Unnamed Def

150 Wis. 2d 352 (1989)
St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)
Wis JI-Cr SM-12

A. Proceeding conducted by a Judge to determine whether certain crimes were committed and by whom

§ 968.26(1b)(b)

B. "Judge" does not include a "reserve Judge"

St v Washington
83 Wis. 2d 808 (1978)

C. John Doe proceeding not proceeding in Ct of record and John Doe Judge not equivalent of a Ct

D. Doctrine of separation of powers set forth in Wis Constitution not violated by Judge performing both investigative and judicial duties

§ 968.26

E. Initiated by any person, sworn or unsworn, who complains to Judge that person has reason to believe crime committed within Judge's jurisdiction

Wis JI-Cr SM-12

1) Complainant need not know who committed crime

St ex rel Reimann
v Cir Ct
214 Wis. 2d 605 (1997)

2) Complaint need not establish probable cause but must establish that the complainant has "reason to believe" crime committed

St ex rel Kowaleski
v Dist Ct
254 Wis. 363 (1949)

F. Not necessary that name "John Doe" be used, and actual person's name may be used in subpoenas

1) Named person has no right to attend proceedings or inspect DA's transcript

§ 968.26(5)

G. Proceeding to last no more than six months, but may be extended

2. Role of Judge in John Doe Proceedings

St ex rel Reimann
v Cir Ct
214 Wis. 2d 605 (1997)

A. Initial role of Judge to determine whether complainant has "reason to believe" crime was committed

1) Objective test

2) Allegation must be supported by objective, factual assertions, not mere opinions or conclusions

Naseer v Miller
(In re John Doe Petition)

2010 WI App 142, ¶ 13
329 Wis. 2d 724

3) Analysis must be limited to four corners of the complaint. Ct cannot take extraneous matters into account until later in the process

St ex rel Unnamed Persons v St (In re John Doe Proceeding)
2003 WI 30, ¶ 30
260 Wis. 2d 653

4) Denial of petition subject to review under § 809.51 supervisory writ procedures

§ 968.26(1m)

B. If petition is filed by DA, Judge shall convene a John Doe proceeding

§ 968.26(2)(am)

C. If a petition filed by someone other than a DA, Judge shall, upon finding "reason to believe," refer matter to DA

§ 968.26(2)(am)

1) If complaint is about DA, refer to a different prosecutor

§ 968.26(2)(b)

2) DA has 90 days from referral to issue charges or to refuse to do so

§ 968.26(2)(b)

3) If the DA refuses to issue charges, DA shall provide the referring Ct with all law enforcement records pertaining to the matter along with written statement why DA is refusing to charge

§ 968.26(2)(b)

4) Judge shall convene a John Doe proceeding if Judge determines it "necessary to determine if a crime has been committed" after considering law enforcement reports, records, DA reports, and any other records the Judge finds relevant

St v Washington
83 Wis. 2d 808, 824
(1978)

D. Must conduct self as neutral detached magistrate in determining probable cause

St v Washington
83 Wis. 2d 808, 823
(1978)
St v O'Connor
77 Wis. 2d 261, 284
(1977)

1) Ensure procedural fairness

St v Washington
83 Wis. 2d 808 (1978)

2) Judge's behavior should not impair ability to make independent determination of probable cause

a. Communication between complainant or prosecutor and Judge as to substance of proceedings should be made part of record

St v Cummings
199 Wis. 2d 721 (1996)

3) May also issue search warrants

St ex rel Unnamed Persons v St (In re John Doe Proceeding)
2003 WI 30
260 Wis. 2d 653

4) May disqualify counsel for witness, but must give reasons on record for doing so, which may be sealed

§ 968.26
St ex rel Robins v Madden
2009 WI 46
317 Wis. 2d 364
St v Washington
83 Wis. 2d 808 (1978)
St ex rel Long v Keyes
75 Wis. 288 (1889)

E. Affirmative duty to examine complainant and those witnesses that the Judge determines to be necessary and appropriate to ascertain whether a crime was committed and by whom

St v Washington
83 Wis. 2d 808, 823 n.10
(1978)

1) Although usual for DA to initiate and conduct proceedings, § 968.26 does not require it, nor does it set forth DA's duties with regard to the conduct of the hearing

St ex rel Hipp v Murray
2008 WI 67
310 Wis. 2d 342

2) Exclusive power to subpoena any witness or document requested by DA or deemed necessary

§ 969.01(3)
St v Brady
130 Wis. 2d 443 (1986)
St v Brady
118 Wis. 2d 154
(Ct. App. 1984)

a. Authority of John Doe Judge to issue material witness warrant under § 969.01(3) questionable since John Doe not necessarily a "felony criminal proceeding" as required

Custodian of Records for LSTB v St
2004 WI 65
272 Wis. 2d 208
amended and reconsideration denied
2004 WI 149
277 Wis. 2d 75

b. Subpoena for documents must be based on probable cause

St ex rel Jackson v Coffey
18 Wis. 2d 529 (1963)

3) Witness need not be informed of substance of complaint, nature of proceedings, or extent of inquiry

St v Hanson
2019 WI 63, ¶ 35
387 Wis. 2d 233

a. Although a witness is not subject to custodial interrogation and therefore *Miranda* warnings are not required, the Wis Supreme Ct recommends addressing a witness in accordance with Wis JI-Cr SM-12

Wis JI-Cr SM-12

b. Advise witnesses on record of right against self-incrimination

c. Advise witnesses on record that testimony may be used to support issuance of warrant

Wis JI-Cr SM-12

d. Advise witnesses on record of right to consult Atty before answering questions

§ 968.26

4) Advise Atty representing witness that Atty not allowed to examine client or cross-examine any witnesses or argue before Judge

§ 968.26(4)

F. Secrecy of proceedings

St v Unnamed Def
150 Wis. 2d 352 (1989)
St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

1) Proceedings presumptively open, although John Doe Judge may close to public for compelling reasons in exercise of sound discretion

2) CAUTION: Because of presumption that all Ct proceedings are open to the public, any order for secrecy should balance any compelling need for secrecy against public interest in open proceedings

In re Wis Family Counseling Servs v St
95 Wis. 2d 670
(Ct. App. 1980)

3) Factors to consider

a. Keeping John Doe target from fleeing

b. Keeping arrested Def from knowledge that might cause Def to flee

c. Preventing Defs from collecting perjured testimony for trial

d. Preventing certain interested persons from thwarting inquiry

e. Preventing certain interested persons from tampering with prospective testimony or secreting evidence

f. Freeing witnesses from threat of immediate retaliation

g. Preventing testimony that may be mistaken, untrue, or irrelevant from becoming public

St v Cummings
199 Wis. 2d 721 (1996)

4) The above factors also apply if there is a request to seal a search warrant

Recommendation

5) If secret, proceedings should be on record so violations of Ct orders can be enforced by contempt power

6) Attys and witnesses should be told on record at beginning, close, or adjournment of testimony not to discuss proceedings or testimony with anyone

a. Should be advised that violation of secrecy order will subject person to contempt penalties

St ex rel
Indiv Subpoenaed at
John Doe Case v Davis
2005 WI 70
281 Wis. 2d 431

b. John Doe Judge has no authority to require counsel for a witness to take an oath of secrecy when proceedings are already subject to secrecy oath

§ 968.26
§ 972.08(1)
St ex rel Newspapers Inc
v Cir Ct
65 Wis. 2d 66 (1974)

G. If immunity to be granted, motion of DA and actual grant of immunity must be in open Ct

H. Compelling testimony

§ 968.26

1) Motion by DA to compel witness to testify made in John Doe proceeding

St ex rel Newspapers Inc
v Cir Ct
65 Wis. 2d 66 (1974)

2) Ct's ruling on motion itself made in open Ct

a. Details of DA's motion (such as questions witness to be compelled to answer) should NOT be recited in open Ct

b. State only that DA made motion to compel testimony of named witness and that motion granted or denied, then proceed with John Doe

§ 972.08(2)

3) Upon witness's continued refusal, Ct may summarily order confinement until witness willing to give testimony or until John Doe investigation concluded, but in no case exceeding 1 year

a. Person confined not admitted to bail pending determination of appeal taken from order of confinement

St v Brady
118 Wis. 2d 154

(Ct. App. 1984)

4) John Doe Judge may not issue material witness warrant

a. John Doe not a felony criminal proceeding

I. Access to testimony

§ 971.23(1)

1) Def has access to any statement Def made that State has, including testimony in John Doe proceeding

2) DA has access to transcript

a. Only that portion of testimony used at prelim or trial open to inspection

§ 971.23(1)

3) If DA calls John Doe witness to testify at trial, Def must be allowed to use that witness's John Doe testimony to impeach

a. Allowed even if DA does not use John Doe testimony

§ 968.26(5)(c)

J. Any search warrants related to the proceedings must be issued by a different Judge

3. Disposition

§ 968.26(2)(d)

A. In matters petitioned by others than a DA, Judge may issue a complaint if Judge finds sufficient credible evidence to warrant a prosecution

§ 968.26(2)(d)

1) Judge may consider investigative reports and records in addition to sworn testimony

2) Standard is essentially whether Judge can find prosecutive merit for the matter to proceed

St v O'Connor
77 Wis. 2d 261 (1977)

B. Judge other than Judge hearing testimony may issue complaint

St v Unnamed Def
150 Wis. 2d 352 (1989)

1) Judge issuing criminal complaint does not offend doctrine of separation of powers, even though executive branch (DA) typically issues criminal complaints

C. Warrant issued for arrest of accused

D. Findings of Ct should be made on record

4. John Doe Problems

St v Washington
83 Wis. 2d 808, 822
(1978)

A. John Doe investigation limited to subject matter of complaint on which proceedings commenced, and thus relevancy issues arise

1) Test is that information sought must be connected with the suspected criminal activity in some manner

St v Hoffman
106 Wis. 2d 185, 204–07
(Ct. App. 1982)

2) John Doe proceeding not to be used as discovery tool to aid prosecution after complaint issued

a. Writ of prohibition may issue to prevent John Doe proceeding from exceeding lawful scope

b. If lawful scope exceeded, suppression of witness's testimony and its fruits is appropriate remedy

St v Washington
83 Wis. 2d 808, 829 n17
(1978)

B. Sec.

968.26 grants power to issue subpoenas but does not specifically authorize John Doe Judge to force compliance

1) Sec. 785.02 provides that Ct of record may find any person in contempt who disobeys any process or lawful order of Ct

§ 967.02(1t), (2m)

a. See distinction between definitions of Judge and Ct

St v Washington
83 Wis. 2d 808 (1978)

2) Orders to be enforced by contempt proceedings should be issued by Ct of record

3) Judge other than John Doe Judge should preside at contempt proceedings

Custodian of Records
for LTSB v St
2004 WI 65
272 Wis. 2d 208
amended and
reconsideration denied
2004 WI 149
277 Wis. 2d 75

4) Custodian of documents may challenge subpoena as overly broad and therefore unreasonable

C. If DA did not make complaint or refuses to assist, or if DA's office involved, may have to appoint Special Prosecutor

St v Cummings
199 Wis. 2d 721 (1996)

D. Even while a John Doe proceeding is in progress, the DA maintains the ability to issue a complaint

St v O'Connor
77 Wis. 2d 261 (1977)

E. Discretion of Ct to permit public officials with law enforcement responsibilities to be present during examination and to permit access to transcript

F. Conflicts caused by multiple representation of witness by Atty

1) Threatens secrecy of John Doe

2) Witnesses to be granted immunity may be giving testimony against other witnesses represented by same Atty

St v Miller
160 Wis. 2d 646 (1991)

3) Ct has authority to disqualify counsel when actual or serious potential conflict of interest exists

a. Over client's objection, and

b. Over adequate waiver of right to conflict-free representation

St ex rel Unnamed Persons v St (In re John Doe Proceeding)
2003 WI 30
260 Wis. 2d 653

c. Must give reasons on record for doing so, which may be sealed

St ex rel Unnamed Persons v St (In re John Doe Proceeding)
2003 WI 30
260 Wis. 2d 653

G. John Doe Judge rendering judicial decision must create record for possible review

CR 49: INQUESTS

1. Purpose and Venue

A. To inquire how a person died

§ 979.04(1)
St ex rel Kurkierewicz v Cannon
42 Wis. 2d 368 (1969)

B. Called when DA has reason to believe a death was caused under circumstances indicating

1) A type of homicide

2) Criminal negligence

3) Suicide

C. May be in any Cty where a trial may be held if criminal charges

2. Who May Order

§ 979.04(1), (2)
Mohrhusen v McCann
62 Wis. 2d 509 (1974)
St ex rel Kurkierewicz v Cannon
42 Wis. 2d 368 (1969)

A. DA

B. Circuit Ct Judge

1) Judge may issue order if there is finding that DA abused discretion by not initiating inquest

C. Request of coroner or medical examiner made via DA

3. Hearing Procedure

§ 979.05(1)

A. Conducted by Judge or Circuit Ct Comm'r (CCC)

§ 979.04(1)
Mohrhusen v McCann
62 Wis. 2d 509 (1974)

B. DA must appear and represent the State and present all evidence relevant and material to the inquiry

§ 979.05(2)

C. Conducted in front of a jury unless otherwise requested by DA or coroner or medical examiner

D. Jury shall consist of six (6) jurors

E. Jurors should be summoned in same manner as set out in §§ 756.04, 756.05

§ 979.05(5)

F. Ct may give appropriate preliminary instructions

G. DA may make statements to jurors at any time during the proceedings on evidentiary or procedural matters

§ 979.05(6)
St ex rel Schulter v Roraff
39 Wis. 2d 342 (1968)

H. Court may order proceeding to be secret on own or at DA's request

§ 979.08(2)

I. Burden of Proof

1) Finding shall be based on probable cause

4. Juror Selection

§ 979.05(3)

A. Judge or CCC shall conduct the voir dire (See CR 23, Sec. 4, this volume)

B. Prospective juror may be excused for cause (See CR 23, Sec. 6, this volume)

C. DA may also question potential jurors

D. Alternate jurors may be selected if deemed necessary

E. Jurors sworn via oath or affirmation in § 979.05(4)

§ 979.05(7)

F. Jurors to be compensated as under § 756.25

5. Inquest Witnesses

§ 979.06(1)

A. To be subpoenaed by Ct at request of DA or coroner or medical examiner

§ 979.06(2)

1) May include the calling of expert witnesses

§ 979.06(3)

B. Witnesses may have counsel present, however

1) They cannot conduct own questioning

2) They cannot argue to Ct or jury

C. Witnesses shall be sworn by oath set out in § 979.06(4)

§ 979.06(5)

D. Testimony must be reduced to writing or recorded

§ 979.06(6)
§ 814.67

E. Inquest witnesses to be reimbursed as any other witnesses

6. Compelled Testimony

§ 979.07(1)(a)

A. Witnesses may assert the privilege against self-incrimination with the following results

1) DA may grant immunity

2) Testimony may be compelled

§ 979.07(2)

3) If witness refuses, may be subject to contempt under Ch 785

§ 979.07(1)(b)

B. Any immunity is subject to § 972.085 restrictions

C. See CR 26, this volume, for discussion of immunity

7. Jury Instructions

§ 979.08(1)

A. Prepared and submitted by DA

B. The final instructions shall be compiled by Ct

§ 979.08(1)

C. Instructions shall include those criminal offenses for which the Ct believes a reasonable jury might return a verdict

§ 979.08(3)

D. Written instructions to be sent in with the jury during deliberations

8. Verdict

§ 979.08(3)(a), (b)

A. Verdict form must allow consideration of either of following

1) Death caused by criminal means

a. Specific crime(s), and

b. Name of person(s) who committed crime

2) Death caused by accident, natural causes, suicide, or an act privileged by law

§ 979.08(2), (4)

B. Verdict shall be unanimous, in writing, and signed by all jurors

C. Effect of verdict

§ 979.08(5)

1) Advisory

2) Up to discretion of DA

9. Confidentiality of Record

§ 979.08(7)

A. Record may remain secret unless ordered open by Ct upon petition of DA

CR 50: SEXUALLY VIOLENT PERSON COMMITMENT

1. General Provisions

A. Nature and Purpose

St v Carpenter
197 Wis. 2d 252 (1995)
St v Post
197 Wis. 2d 279 (1995)

1) A civil commitment procedure primarily intended to provide treatment to offenders and protect public from dangerous sex offenders who meet the commitment criteria

St v Rachel
224 Wis. 2d 571
(Ct. App. 1999)

2) Rules of Civil Procedure apply

St v Burgess
2003 WI 71, ¶ 34
262 Wis. 2d 354

3) Lack of confidentiality is not violation of equal protection

§ 980.01

B. Definitions

1) "Department" means the Department of Health Services (DHS)

§ 980.01(1b)

2) "Acts of sexual violence" means conduct that constitutes the commission of a sexually violent offense (SVO)

§ 980.01(7)

3) "Sexually violent person" (SVP) means

a. Person who has been convicted of an SVO, OR

b. Person who has been adjudicated delinquent for an SVO, OR

c. Person who has been found not guilty of or not responsible for an SVO by reason of insanity or mental disease, defect, or illness, AND

d. Person who is dangerous because he or she suffers from mental disorder that makes it likely that person will engage in one or more acts of sexual violence

§ 980.01(1m)

- "Likely" means more likely than not

St v Laxton
2002 WI 82
254 Wis. 2d 185

- Proof of lack of control is established by nexus between mental disorder and dangerousness

4) "Sexually violent offense" means any of the following

§ 980.01(6)(a)
St v Irish
210 Wis. 2d 107
(Ct. App. 1997)

a. Any crime specified in §§ 940.225(1), (2), or (3), 948.02(1) or (2), 948.025, 948.06, 948.07, or 948.085

§ 980.01(6)(am)

b. An offense that before June 2, 1994, was a crime under Wis law, and that is comparable to any crime specified in para. a. above

§ 980.01(6)(b)

c. Any crime specified in §§ 940.01, 940.02, 940.03, 940.05, 940.06, 940.19(2), (4), (5), or (6), 940.195(4) or (5), 940.30, 940.305, 940.31, 941.32, 943.10, 943.32, or 948.03 that is determined, in a proceeding under § 980.05(3)(b), to have been sexually motivated

§ 980.01(6)(bm)

d. Any offense that before June 2, 1994, was a crime under Wis law, that is comparable to any crime specified in para. c. above, and that is determined in a proceeding under § 980.05(3)(b), to have been sexually motivated

§ 980.01(6)(c)

e. Any solicitation, conspiracy, or attempt to commit a crime under para. a., b., c., or d. above

§ 980.01(5)

5) "Sexually motivated" means that one purpose for an act is for actor's sexual arousal or gratification or for sexual humiliation or degradation of the victim

St v Adams
223 Wis. 2d 60
(Ct. App. 1998)

6) "Mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence

§ 980.01(9)

7) "Substantially probable" means "much more likely than not"

St ex rel Pharm v Bartow
2007 WI 13, ¶¶ 39–40
298 Wis. 2d 702

C. Jurisdiction

St v Burgess
2003 WI 71, ¶ 34
262 Wis. 2d 354

1) Enrolled tribal member committing offenses on reservation subject to proceedings

2) Interstate Agreement on Detainers (IAD) and extradition waivers do not prevent Wis from commencing Ch 980 commitment proceeding

3) Person convicted of sexually violent offense and incarcerated in Wis is subject to this State's broad scope to prosecute Ch 980 proceedings

§ 980.02

2. Procedure

A. Petition—Civil Ct action

§ 980.02(1)

1) Who may file

a. Dept of Justice (DOJ), at request of agency with jurisdiction over person

St v Bell
2006 WI App 30, ¶ 17
289 Wis. 2d 275

- DA can request DOC to seek a second opinion on whether person is sexually violent

St v Byers
2003 WI 86, ¶ 43
263 Wis. 2d 113

b. If the DOJ does not file, then the following may file petition:

- DA of Cty of conviction, delinquency adjudication, or § 971.17 finding

- DA of Cty where discharged offender may reside or be placed upon discharge

§ 980.02(1)(b)3.

- DA of Cty in which the person is in custody

§ 980.02(1m)
St v Stanley (In re Commitment of Stanley)
2014 WI App 89, ¶ 23
356 Wis. 2d 268

2) Petition must be filed before person is released or discharged

St v Gilbert
2012 WI 72, ¶¶ 17, 28
342 Wis. 2d 82

3) Petition may be filed after person's parole or extended supervision is revoked

4) Petition shall allege

a. Person satisfies any of the following

- A conviction of an SVO; or
- Delinquent for an SVO; or
- Not guilty of an SVO by reason of mental disease or defect

St v Zanelli
212 Wis. 2d 358
(Ct. App. 1997)

b. Person has a mental disorder

c. Person is dangerous to others because mental disorder makes it likely that person will engage in acts in sexual violence

5) Petition must state particulars showing SVP, prior offenses, sexual motivation for offenses

St v Zanelli
212 Wis. 2d 358
(Ct. App. 1997)

6) Need not be sworn

St v Wolfe
2001 WI App 136
246 Wis. 2d 233

7) Need not be served on subject before initial appearance

§ 980.02(4)

B. Venue

1) Petition may be filed in Circuit Ct of

a. Cty of original conviction, delinquency adjudication, or commitment order

§ 980.02(5)

- DOJ may always file petition in Circuit Ct of Dane Cty

b. Cty of intended placement or residence

c. Cty where in custody, imprisoned, or currently placed

§ 980.02(6)

NOTE: Juv Ct does not have jurisdiction over a petition filed under § 980.02 alleging that a person who was adjudicated delinquent as a child is SVP

§ 980.105

2) DHS to determine Cty of residence using following factors

a. The voluntary concurrence of physical presence with intent to remain in a place of fixed habitation

b. Presence equals prima facie evidence of intent to remain

c. Apply paras. a. and b. above to facts that existed at time SVO occurred that resulted in the sentence, placement, or commitment in effect at time of this petition

§ 980.034

3) Within 20 days after probable cause hearing, subject may seek change of venue for trial. Time may be extended for cause

a. Motion for change must be supported by affidavit showing nature of prejudice; petitioner may file counter-affidavit

b. Only one change allowed

c. Ct may order change of location or select jury from second Cty

C. Ct's duty upon filing of petition

§ 980.04(1)

1) Review to determine whether immediate detention order needed

a. Issue detention order if probable cause to believe person eligible to be committed as an SVP

b. Order detained person to Juv correctional facility or secured RCCCY until determination of status at trial

§ 980.04(2)(a), (b)1., 2.

2) Hold probable cause hearing within 30 days after filing if not detained; if subject detained, then within 10 days after scheduled release or discharge date. Time may be extended for good cause shown

Recommendation

a. Make finding on record that good cause has been shown

§ 980.03(1)

3) Notice

a. Give person reasonable notice of all hearings

§ 980.03(1)

b. Other parties may be designated by Ct to receive notice

St v Spaeth (In re Commitment of Spaeth)
2014 WI 71, ¶ 15
355 Wis. 2d 761

4) If the requirements of § 980.02 are satisfied at the filing of the petition, petition is not invalidated if the predicate conviction is reversed

D. Def's Rights—Not necessarily same rights as those afforded criminal Def

St v Luttrell
2008 WI App 93
312 Wis. 2d 695

1) Sec. 971.14 competency examination is not available to person subject to Ch 980

St v Brown
215 Wis. 2d 716, 727
(Ct. App. 1997)

2) Substitution: governed by civil substitution rules, § 801.58(1)

St v Matthews
2021 WI 42, ¶¶ 20, 24
397 Wis. 2d 1

Request is timely if filed before Ct hearing a preliminary contested matter, which is a substantive issue going to the ultimate merits of the case; not procedural

§ 980.03(2)(a)

3) Counsel: Ct shall refer person to SPD, who shall appoint counsel regardless of indigency

§ 980.03(2)(b)

4) Remain silent

St v Mark
2006 WI 78, ¶ 2
292 Wis. 2d 1

a. Pre-petition right against self-incrimination is not ordinarily self-executing, and must be invoked

b. Statement to be excluded must be

- Testimonial,
- Compelled, and
- Incriminating

St v Harrell
2008 WI App 37
308 Wis. 2d 166

c. Fifth Amendment protection applies to derivative use of statements in expert reports

St v Lombard
2004 WI 95
273 Wis. 2d 538

d. For example, State may use statements made at pre-petition interview that do not expose subject to future criminal prosecution

St v Kienitz
221 Wis. 2d 275
(Ct. App. 1998), *aff'd*,
227 Wis. 2d 423 (1999)

e. Includes refusal to be examined by expert psychiatrists or psychologists

§ 980.038(2)(a)

f. State can comment on refusal to be interviewed

§ 908.03(2)(c)

5) Present and cross-examine witnesses

§ 980.03(3)

6) Jury may be requested by the subject of the petition, the person's Atty, or the petitioner. Ct may order jury trial on own motion

§ 980.03(3)

7) Unanimous verdict

§ 980.03(2)(d)

8) All hearings reported by Ct reporter

§ 980.031(3), (4)

9) Independent exam at Cty expense

a. Includes right of reasonable access to subject for exam

§ 980.08(3), (4)
St v Thiel
2004 WI App 225
277 Wis. 2d 698

b. Ct must appoint an examiner. Indigent Def cannot choose

E. Probable cause hearing

§ 980.04(2)

1) Time

§ 980.04(2)(a), (b)1.

a. Within 30 days after filing petition

§ 980.04(2)(a), (b)1.

b. Unless time extended by Ct for good cause shown on its own motion, motion of any party, or stipulation of parties

§ 980.04(2)(b)2.

c. If person named in petition is in custody under a sentence, dispositional order, or commitment, and if probable cause hearing will be held after the date the person is scheduled to be released or discharged, then:

- Probable cause hearing shall be held no later than 10 days after the scheduled release or discharge date
- Unless time extended by Ct for good cause shown on its own motion, motion of any party, or stipulation of parties

§ 980.04(2), (3)

2) Determine whether probable cause exists that person is sexually violent

§ 980.04(3)

a. If probable cause found

- Take into custody
- Order transfer within reasonable time to appropriate facility specified by DHS for SVP evaluation by DHS

§ 980.05(1)

- Schedule trial within 90 days

§ 980.04(3)

b. If no probable cause, dismiss the petition

§ 980.038(3)

3) Hearing may be conducted by telephonic and audiovisual means, if available, unless good cause to contrary is shown

a. Ct reporter must be in simultaneous voice communication with all parties

b. Proceeding must be in open Ct or other place reasonably accessible to public

4) Motions

§ 980.038(1)(a

a. Within 30 days after probable cause hearing, motion challenging jurisdiction or competency of the Ct or timeliness of the petition shall be filed under § 980.02

b. Failure to file waives challenges to petition filed under § 980.02

§ 980.038(1)(b)

c. Ct may exercise personal jurisdiction over person named in § 980.02 petition, although person not served under § 801.11(1) or (2) with verified petition or order for detention and person has not had probable cause hearing

F. Discovery: § 980.036 governs discovery; Ch 804 does not apply

1) Upon demand, prosecuting Atty shall disclose to person subject to Ch 980 and permit the person to inspect and copy or photograph all of the following in prosecuting Atty's possession, custody, or control:

a. Subject's written or recorded statements concerning allegations and other matters at issue

b. Names of witnesses to subject's written and oral statements

c. Written summary of and list of witnesses to subject's oral statements that are to be used at trial or proceeding

d. Subject's criminal record

e. List of witnesses to be called at trial or proceeding, and witnesses' addresses; disclosure does not apply to rebuttal or impeachment witnesses

f. Relevant written or recorded statements and criminal records of witnesses

g. Results of scientific, physical, mental, psychological testing that prosecuting Atty intends to use at trial or proceeding and raw data used in testing

St v Jendusa
2021 WI 24, ¶¶ 30–31, 36
396 Wis. 2d 34

- Including Wisconsin-specific risk assessment data

h. Any physical or documentary evidence to be offered at trial or proceeding

i. Exculpatory evidence

2) Upon demand, subject must disclose to the prosecuting Atty and permit inspection, copying, and photographing of the following in subject's or subject Atty's possession, custody, or control:

a. List of witnesses to be called at trial or proceeding, and witnesses' addresses; disclosure does not apply to rebuttal or impeachment witnesses

b. Any relevant written or recorded statements, including § 980.031(5) reports, of witnesses to be called at trial or proceeding

c. Known criminal records of witnesses

d. Results of scientific, physical, mental, psychological testing that subject intends to use at trial or proceeding and raw data used in testing

e. Any physical or documentary evidence to be offered at trial or proceeding

§ 980.036(3m)

3) Disclosure must be made within a reasonable time after the probable cause hearing and within a reasonable period of time before the trial or proceeding

§ 980.036(9)

4) Sanctions for failure to disclose:

a. Exclude witnesses and evidence unless good cause shown

b. Grant a recess or adjournment of trial or proceeding

c. In addition, Ct may advise Jury, subject to § 980.036(4), of failure to disclose or of untimely disclosure

5) Miscellaneous

§ 980.036(4)

a. No comment on failure to call a disclosed witness

§ 980.036(5)

b. Ct may order the production of any item or raw data intended to be introduced at trial or proceeding for testing or analysis subject to terms and conditions

§ 980.036(6)

c. Ct may issue a protective order

§ 980.036(7)

d. Ct may inspect documents, in camera, to mask or delete irrelevant matter

§ 980.036(8)

e. Parties have a continuing duty to disclose

§ 980.05

G. Trial

1) Held within 90 days after finding of probable cause

2) One or more continuances allowed for good cause

a. Ct's own motion

b. Motion of party

c. Stipulation

St v Zanelli
212 Wis. 2d 358
(Ct. App. 1997)

3) Rules of evidence in criminal actions apply

St v Franklin
2004 WI 38, ¶¶ 14–16
270 Wis. 2d 271
St v Kaminski
2009 WI App 175, ¶¶ 10–12, 322 Wis. 2d 653

a. Except "other acts" not governed by § 904.04(2). Evidence must be relevant and not outweighed by unfair prejudice

4) Jury trial, if requested, within 10 days after probable cause hearing or upon Ct's own motion; otherwise, trial to Ct

a. If one party withdraws request for jury trial, two persons who did not make request must consent (the subject of the petition, subject's counsel, DA, or DOJ)

§ 980.05(2m)(a), (b)
§ 805.08(3)
St v Treadway
2002 WI App 195
257 Wis. 2d 467

b. Civil rules apply, but four peremptory strikes rather than three

§ 980.05(2m)(c)

c. At any time before verdict, parties may, with Ct approval, stipulate that jury be less than 12

5) Burden of proof on petitioner

§ 980.05(3)(a)

a. Must prove beyond reasonable doubt that subject is SVP

b. If State alleges sexually motivated offense as basis for petition, State must prove beyond reasonable doubt that act was sexually motivated

c. Evidence that subject of petition has prior convictions for an SVO NOT sufficient to establish beyond a reasonable doubt that the person has a mental disorder

St v Laxton
2002 WI 82
254 Wis. 2d 185

d. Person's serious difficulty in controlling his/her behavior is established by proof that person's mental disorder predisposes such person to engage in acts of sexual violence establishing it is more likely than not that such person will again commit such acts

St v Bush
2005 WI 103
283 Wis. 2d 90

e. In evaluating the offender's dangerousness, it is not necessary to prove a recent overt act when there is a break in the offender's incarceration and the offender is re-incarcerated for nonsexual behavior

St v Budd
2007 WI App 245, ¶ 18
306 Wis. 2d 167

f. Evidence of general screening process for initiation of Ch 980 proceedings is not relevant to whether specific respondent is SVP

6) Telephonic and audiovisual testimony permitted upon showing of good cause under § 807.13(2)

§ 980.031(5)

7) Professional witnesses are not subject to sequestration, and may not testify unless they submit a written report to both parties at least 10 days before proceeding

St v Madison
2004 WI App 46
271 Wis. 2d 218
St v Pletz (In re Commitment of Pletz)
2000 WI App 221
239 Wis. 2d 49

H. Unanimity requires only that jury find person has mental disorder. Jury need not agree on which mental disorder. It is Trial Ct's discretion whether to submit a general or special verdict

§ 980.06

I. Commitment

RMC Form CR-236

1) If Ct or jury determines person is an SVP, Ct must order subject committed to custody of DHS until person is no longer an SVP

Recommendation

a. Enter commitment order as soon as possible after judgment

2) Commitment order shall specify that the person be placed in institutional care

3) Commitment to institutional care

a. SVO can be placed

§ 980.065(1m)

- At the secure mental health facility established under § 46.055 at Wisconsin Resource Center established under § 46.056 or

§ 980.065(2)

- At secure mental health unit or facility provided by DOC

St v Anthony DB
2000 WI 94
237 Wis. 2d 1

4) Order for involuntary medication must follow provisions of Ch 51

a. Order for involuntary medication expires unless it receives the appropriate periodic review

J. Postcommitment requirements

§ 980.063

1) Must provide a biological specimen to state laboratories for DNA analysis

§ 980.07(1)–(3)

2) Reexamination must be conducted within 12 months after date of initial commitment and again thereafter at least once each 12 months to determine whether Ct should consider supervised release or discharge

a. Person has right to retain qualified expert to conduct reexamination; or Ct can appoint if person requests appointment and is indigent

St v Jones
2013 WI App 151, ¶ 6
352 Wis. 2d 87

b. When report submitted to Ct, person has right to an Atty and person shall be referred to appointing agency

c. Examiner must place copy of written report in person's records and provide to Ct within 30 days after reexamination

d. Ct that committed person may order reexamination at any time while person is subject to commitment order

§ 980.038(4)

3) Section 809.30 governs appeals by person committed. Section 808.04(4) and Chs 808 and 809 govern appeals by State

§ 980.07(4), (6)

4) Annual treatment progress report and any reexamination report shall be filed with the Ct, committed person, DOJ, or DA, and with person's Atty as soon as retained or appointed

3. Petition for Supervised Release

A. Time frame

§ 980.08

1) Any person committed to institutional care may petition committing Ct to modify its order if

§ 980.08(1)
St v Williams
2001 WI App 263
249 Wis. 2d 1

a. It is at least 12 months after initial commitment order, or

b. It is at least 12 months since the most recent release petition was denied, or since supervised release was denied under § 980.09(4), or

c. It is at least 12 months after most recent order for supervised release was revoked

§ 980.08(1)

NOTE: The director of the facility where the person is placed may file a petition at any time.

§ 980.08(3)(a)

2) Within 20 days after receipt of petition, Ct must appoint one or more examiners at Cty expense to furnish written report within 60 days after appointment unless extended for good cause by Ct

a. If an examiner within 6 months before petition supports supervised release, Ct may appoint that examiner

St v Alger (In re Commitment of Alger)
2013 WI App 148, ¶ 1
352 Wis. 2d 145
aff'd, 2015 WI 3
360 Wis. 2d 193

b. Sec. 907.02(1) does not apply to commitment petitions filed before February 1, 2011

c. If examiner believes supervised release appropriate, necessary services and treatment should be detailed

St v Thiel
2004 WI App 225
277 Wis. 2d 698

d. Petitioner entitled to appointment by Ct of "qualified and available" examiner paid by Cty under § 980.031(3) [formerly § 980.03(4)]

§ 980.08(4)(a)

3) Ct, without jury, must hear petition within 120 days after Ct-appointed examiner's report filed with Ct unless Ct for good cause extends time

B. Hearing

§ 980.08(4)(cj)

1) Burden is on petitioner to establish criteria by clear and convincing evidence

§ 980.08(4)(c)

2) In making decision, Ct may consider

a. Nature and circumstances of the behavior that was the basis for the petition

b. Person's mental history and present mental condition

c. Where person will live and how support will be provided

d. Access to treatment

- Decision involving person who is a serious child sexual offender may not be based only on fact that person is proper subject for pharmacological treatment or that person is willing to participate in such treatment

§ 980.08(4)(cg)

3) Ct may not authorize supervised release unless all of the following are met:

a. Person is making significant progress in treatment and progress can be sustained while on supervised release

b. It is substantially probable person will not engage in an act of sexual violence while on supervised release

c. Treatment that meets the person's needs and qualified provider are reasonably available

d. Person can be reasonably expected to comply with treatment and rules

e. A reasonable level of resources can be provided for the placement, supervision, and ongoing treatment needs that are required for safe management of person

§ 980.08(4)(dm)1., 4.

4) Ct shall order Cty of person's residence, as determined by DHS under § 980.105, to prepare report to be submitted to DHS within 120 days after the order

§ 980.08(4)(f)

5) Ct shall direct DHS to use report to prepare supervised release plan and submit within 30 days after Cty submitted its report; for good cause, Ct may grant one 30-day extension

§ 980.08(4)(g)

6) If plan is inadequate because of treatment options, Ct shall order DHS to prepare another plan under § 980.08(4)(f)

§ 980.08(4)(g)
St v Thiel
2012 WI App 48
340 Wis. 2d 654

7) Ct shall approve the plan if it meets the person's treatment needs and the community's safety needs

C. Municipal involvement

Town of Mentor v St
2021 WI App 85, ¶¶ 27–

29, 400 Wis. 2d 138

1) Ch 980 does not provide for municipal involvement in selecting placement residence

2) Municipality is not foreclosed from intervening under limited circumstances

D. Supervised release

§ 980.08(6m)
St v Milw Cty
2006 WI App 229, ¶ 5
297 Wis. 2d 339

1) Order for supervised release places person in custody and control of DHS

2) Ct shall restrict the person to person's residence for the first year, except for activities approved by DHS under § 980.08(9)(a)

St v Milw Cty
2006 WI App 229, ¶ 41
297 Wis. 2d 339

3) DHS must arrange for control, care, and treatment of person in least restrictive manner consistent with requirements of person and in accordance with plan for supervised release approved by Ct. Trial Ct has power to "fashion a remedy," which includes rejecting proposed solutions that are inadequate, unworkable, or unsanctioned

St v Morford
2004 WI 5, ¶ 56
268 Wis. 2d 300

4) State may seek to modify supervised release order

5) Ct must notify municipal police dept and sheriff for the municipality and Cty in which person will be residing, before release

St v Schulpius
2006 WI 1, ¶¶ 39, 42–43
287 Wis. 2d 44
St v Sprosty
227 Wis. 2d 316, 320,
336–37 (1999)

6) Although failure to locate placement for committed individual ordered released is a procedural-due-process violation, the remedy is not release. Ct may order, under appropriate circumstances, DHS to create a facility to accommodate the individual

§ 980.08(7)

E. Revocation of supervised release

§ 980.08(7)(a), (b)

1) DHS may detain person or petition for revocation if it believes that person has violated or threatened to violate any condition or rule of supervised release or that person is threat to safety of others

§ 980.08(7)(c)

2) DHS must submit a statement to Ct and regional office of SPD within 72 hours after the detention showing probable cause of detention and a petition to revoke supervised release

§ 980.08(7)(d)

3) Ct shall hold hearing on petition within 30 days unless waived by detained person

a. Person may be detained in jail/center or returned to institutional care

§ 980.08(8)

b. State has burden of proof by clear and convincing evidence that any rule or condition of release has been violated or that safety of others requires that supervised release be revoked

St v VanBronkhorst
2001 WI App 190
247 Wis. 2d 247

- Notice of alleged violations required to comply with due process

c. Ct may revoke order and place person in appropriate institution

St v Burris
2002 WI App 262
258 Wis. 2d 454, *aff'd*,
2004 WI 91
273 Wis. 2d 294

d. If revoked because "safety of others requires," Ct shall not consider alternatives to revocation

4. Petition for Discharge

§ 980.09(1)

A. Committed person may petition for discharge at any time

§ 980.09(1)
St v Arends
2010 WI 46
325 Wis. 2d 1
St v Hager
2018 WI 40
381 Wis. 2d 74

B. Ct shall deny the petition without a hearing unless the petition or the record contains facts from which Ct or jury would likely conclude that the person's condition has changed so that the person no longer meets the SVP criteria (1) since the most recent order denying the discharge on the merits; or (2) since the date of initial commitment if there has not been a previous hearing on the merits of discharge

1) Parties may use experts to support their respective positions. Ct may appoint examiners under § 980.09(1m)(d)

St v Alger (In re Commitment of Alger)
2013 WI App 148, ¶ 1
352 Wis. 2d 145, *aff'd*,
2015 WI 3, ¶ 4
360 Wis. 2d 193

2) Sec. 907.02(1) does not apply to petitions filed before February 1, 2011

§ 980.09(1m)
St v Arends
2010 WI 46
325 Wis. 2d 1

3) Counsel shall be appointed

§ 980.09(2)
St v Arends
2010 WI 46
325 Wis. 2d 1
St v Hager
2018 WI 40
381 Wis. 2d 74

4) In reviewing the petition, the Ct may conduct a hearing to determine whether the person's condition has sufficiently changed such that a Ct or jury would likely conclude that the person no longer meets the criteria for commitments as SVP

St v Talley
2017 WI 21, ¶¶ 27, 35, 39
373 Wis. 2d 610

a. In the review under § 980.09(2), the Ct may consider the record, including evidence introduced at the initial commitment trial or at most recent trial on the petition for discharge, and any past and current reports, relevant facts in petition and State's response, and other documents in support of the parties' positions

§ 980.09(2)

b. If Ct determines that record does not contain facts from which Ct or jury would likely conclude the person no longer meets the criteria for commitment, Ct shall deny the petition

§ 980.09(2)

c. If Ct determines that the record does contain facts from which a Ct or jury would likely conclude the person no longer meets the criteria for commitment, Ct shall set the matter for trial

St v Ermers
2011 WI App 113, ¶ 34
325 Wis. 2d 1

d. "Condition has changed" includes any change in the petitioner and any change in professional knowledge and research if that change could result in petitioner not meeting the SVP criteria

St v Richard (In re Commitment of Richard)
2014 WI App 28, ¶ 1
353 Wis. 2d 219

e. New research must be coupled with application to petitioner

St v Talley
2017 WI 21, ¶¶ 34–35, 39
373 Wis. 2d 610
St v Schulpius
2012 WI App 134
345 Wis. 2d 351

f. Expert's opinion must be based on new fact, new research, or new professional knowledge

§ 980.09(3)

C. Trial shall be held within 90 days after the determination that the petition is sufficient

§ 980.09(3)
St v Talley (In re Commitment of Talley)
2015 WI App 4, ¶ 35
359 Wis. 2d 522

1) State has burden by clear and convincing evidence that the person meets the criteria for commitment as SVP

§ 980.01(2)
St v Stephenson (In re Commitment of Stephenson)
2020 WI 92, ¶ 2
394 Wis. 2d 703

a. Expert testimony not required to meet burden on future dangerousness because the qualifying mental disorder predisposes a person to engage in acts of sexual violence

§ 980.09(4)

2) If Ct or jury determines the State has not met its burden, the person shall be discharged

§ 980.09(5)

3) Ct may stay the discharge not longer than necessary, but not longer than 10 working days to comply with notice requirements under § 980.11(2) & (3)

§ 980.09(4)

4) If Ct or jury is satisfied that State has met its burden, Ct shall proceed under § 980.08 to determine whether commitment should be modified to supervised release, unless the person waives consideration of the § 980.08(4)(cg) criteria

§ 980.09(4)

5) If consideration of § 980.08(4)(cg) is waived, waiver is a denial of supervised relief

St v Allison
2010 WI App 103, ¶ 18
329 Wis. 2d 129

6) Summary judgment under § 802.08 is not available. Options are to deny petition or hold hearing

§ 980.095

D. Trial Procedure

1) Jury of 6 may be requested by DA or DOJ, whichever filed the petition, or by the petitioner or petitioner's Atty. Jury is waived unless requested within 10 days after Ct's determination that Ct or jury would likely conclude that person's condition has sufficiently changed

2) Juries shall be selected and treated as in civil actions

3) Peremptory challenges shall begin with the State. If any party declines to challenge, the challenge shall be cast by the clerk by lot

4) No verdict shall be valid unless at least 5 of the jurors agree

5) Motions after verdict may be made without further notice upon receipt of the verdict

St v Alger (In re Commitment of Alger)
2015 WI 3, ¶ 4
360 Wis. 2d 193

6) Discharge petition is not subject to expert witness requirements of § 907.02(1) if underlying commitment proceeding commenced before February 1, 2011; petition is not a special proceeding or an action

5. Collateral Attack

St v Bush
2004 WI App 193
276 Wis. 2d 806
aff'd on other grds
2005 WI 103
283 Wis. 2d 90

A. *State v Escalona-Naranjo*, 185 Wis. 2d 168 (1994), governs collateral attack on underlying commitment

§ 980.11

6. Notice Concerning Release or Discharge

A. DHS shall notify the following if a person released or discharged

1) Victim

2) Adult member of victim's family, if victim died

3) Adult member of victim's family, if victim under 18

4) DOC

B. Notice to be postmarked at least 7 days before release or discharge

CR 51: JUVENILE/ADULT MATTERS

1. Original Jurisdiction of Adult Court

§ 938.02(1)
St v Sanders
2018 WI 51
381 Wis. 2d 522

A. "Adult," for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, means a person who has attained 17 years of age at the time of charge

§ 938.183(1)(a)
St v Wright
218 Wis. 2d 52
(Ct. App. 1998)

B. Juv adjudicated delinquent and alleged to have committed offenses of battery by prisoner or assault by prisoner, while placed in a Juv correctional facility, a Juv detention facility or a secured RCCCY, or who has been adjudicated delinquent and is alleged to have committed battery to an aftercare agent

§ 938.183(1)(ar)

1) Juv alleged to have committed offense that could be joined under § 971.12(1) with offense governed by **Sec. B.**

§ 938.183(1)(b)
St v Hinkle
2019 WI 96
389 Wis. 2d 1

C. Juv alleged to have violated any criminal law if previously waived and convicted in any Adult Ct or previously waived and proceedings pending in any Adult Ct from any other Cty

§ 938.183(1)(c)

D. Juv alleged to have violated any criminal law and Juv previously convicted in Adult Ct of offense over which Adult Cts have original jurisdiction or proceedings pending in Adult Ct for such an offense

§ 938.183(1)(am)

E. Juv alleged to have attempted or committed 1st-degree intentional homicide, or alleged to have committed 2nd-degree intentional homicide or 1st-degree reckless homicide on or after 10th birthday

§ 938.183(1)(ar)

1) Crim Ct also has jurisdiction over any offense joinable under § 971.12(1)

F. Juvs specified in Secs. B.–E. above are subject to provisions of Criminal Code, including criminal penalties, except

§ 938.183(1m)(a)

1) If Juv under age of 15, may only be held in Juv detention or Juv portion of Cty jail

§ 970.032

G. Determination of Adult Jurisdiction of a Juvenile

§ 970.032(1)

1) If Adult Ct determines no probable cause for an original jurisdiction offense, the Ct shall dismiss the case and discharge the Juv

§ 970.032(2)
§ 971.31(13)
S*t v Toliver*
2014 WI 85
356 Wis. 2d 642
St v Geyser
2020 WI App 58
394 Wis. 2d 96

2) If Adult Ct finds probable cause at prelim as to an original jurisdiction offense, or upon motion of the Juv in a misdemeanor case when the basis for adult jurisdiction is prior adult conviction or waiver, then it must determine whether to retain jurisdiction of Juv or transfer jurisdiction to Juv Ct (commonly referred to as "reverse waiver")

St v Kleser
2010 WI 88
328 Wis. 2d 42
St v Verhagen
198 Wis. 2d 177
(Ct. App. 1995)
RMC Form CR-223

3) Adult Ct shall retain jurisdiction unless Juv proves by preponderance of evidence that

§ 970.032(2)
§ 971.31(13)

a. If convicted, Juv could not receive adequate treatment in the criminal justice system

b. Transferring jurisdiction to Juv Ct would not depreciate the seriousness of the offense, and

c. Retaining jurisdiction is not necessary to deter Juv or other Juvs from similar violations

St v Kleser
2010 WI 88, ¶ 84
328 Wis. 2d 42

4) Juv may present evidence to supplement facts establishing probable cause, to put offense in context, but Juv may not seek to contradict offense charged

§ 938.18

2. Jurisdiction by Waiver from Juvenile Court to Adult Court (See Juvenile Benchbook, JV 5, Sec. 3)

§ 938.18(1)(a)

A. Juv age 14 or over alleged to have done any of the following

1) Manufactured, distributed, or delivered controlled substance [§ 961.41(1)]

2) Committed felony murder [§ 940.03], 2nd-degree reckless homicide [§ 940.06], 1st- or 2nd-degree sexual assault [§ 940.225(1) or (2)], taking hostages [§ 940.305], kidnapping [§ 940.31], burglary while armed or using explosive or engaging in battery [§ 943.10(2)], robbery by use or threat of use of dangerous weapon or item appearing to be dangerous weapon [§ 943.32(2)], or robbery of a financial institution [§ 943.87]

§ 938.18(1)(b)

B. Juv age 14 or over alleged to have committed, at the request of or for the benefit of a gang [§ 939.22(9)], a violation that would be felony under Ch 961 or Chs 939–948

§ 938.18(1)(c)

C. Juv age 15 or over alleged to have violated any State criminal law

St v Pablo R
(Int of Pablo R)
2000 WI App 242
239 Wis. 2d 479

D. Juv of any age who absconds and returns as an adult may be waived

St v Vairin M
(In Int of Vairin M)
2002 WI 96
255 Wis. 2d 137

E. Juv Ct may not reconsider its waiver order after criminal complaint filed unless Adult Ct first transfers case

St v Bergwin
2010 WI App 137
329 Wis. 2d 737
St v Becker
74 Wis. 2d 675 (1976)

F. State may not intentionally delay charge until after Juv "ages up" (i.e., becomes old enough to be subject to Adult Ct jurisdiction) to manipulate system and avoid Juv Ct jurisdiction

St v Phillips
2014 WI App 3
352 Wis. 2d 493

G. Adult Ct must remand all counts of waived case to Juv Ct if Juv Ct lacked competency to waive any count

3. Adult Court Options for Sentencing Under Juvenile Justice Code

§ 938.183(1m)(c)
RMC Form CR-224

A. If Criminal Ct does not reverse waive Juv, but Juv found to have committed lesser or joined offense (but not offense giving Criminal Ct original jurisdiction to which it was joined), Criminal Ct shall find Juv delinquent and impose Juv disposition if any of following apply

§ 938.183(1m)(c)1.

1) Criminal Ct finds Juv committed lesser offense or joined offense that is NOT

a. Violation of § 940.20(1) or (2m) or § 946.63 [battery by prisoner, battery to aftercare agent, or assault by prisoner] "under circumstances described in § 938.183(1)(a),"

b. Attempt to violate § 940.01 [attempted 1st-degree intentional homicide] and is not a violation of § 940.02 or § 940.05 [1st-degree reckless or 2nd-degree intentional homicide] "under the circumstances described in § 938.183(1)(am)" and

c. Offense for which Juv Ct could waive jurisdiction

- Examples in which Juv would be found delinquent and have Juv disposition imposed

— Juv accused of battery by prisoner and disorderly conduct but only found to have committed disorderly conduct

— 12-year-old Juv accused of 1st-degree intentional homicide but only found to have committed homicide by negligent handling of a dangerous weapon

§ 938.183(1m)(c)2.

2) Criminal Ct finds Juv committed lesser offense or joined offense that IS

a. Violation of § 940.20(1), (2m), or § 946.43 "under circumstances described in § 938.183(1)(a)," that is an attempt to violate § 940.01 or a violation of § 940.02 or § 940.05 "under circumstances described in § 938.183(1)(am)" or

b. A "waivable offense," but Criminal Ct determines, after a consideration of the waiver criteria under § 938.18, that Juv has proved by clear and convincing evidence it would be in best interests of Juv and public to find him/her delinquent and impose Juv disposition

c. Example: 14-year-old Juv accused of 1st-degree intentional homicide, but found guilty of 2nd-degree intentional homicide

4. Expunction

§ 938.355(4m)

A. 17-year-old's right to request expunction of delinquency adjudications applies to adjudications under § 48.12, 1993 Stats., or § 938.12

1) 2005 Wis Act 344 supersedes *St v Jason JC*, 216 Wis. 2d 12 (Ct. App. 1997), so Juv adjudicated delinquent for offense committed before July 1, 1996, may also request expunction

Recommendation

B. Application for expunction of delinquency adjudication should be made to Juv Ct

§ 973.015

C. Adult Ct may order expunction of criminal record of individual convicted of offense committed when individual was under 25 years old if

1) Maximum penalty for offense is six years or less

2) Individual successfully completes sentence, and

3) Ct determines that individual will benefit and society will not be harmed by expunction

Note: Certain Class H and Class I felonies excepted.

TR 1: PRETRIAL PROCEEDINGS

1. Jurisdiction

A. Subject-matter jurisdiction

§ 345.30
§ 345.20(1)(b)
§ 345.28(1)(c)

1) Circuit Cts have jurisdiction over all moving and nonmoving statutory traffic regulations

§ 755.045(1)
§ 345.30

2) Municipal Cts have exclusive jurisdiction over all ordinance violations, including traffic offenses enacted in accordance with § 349.06 and § 349.13, except if

a. There is no Municipal Ct for the municipality

b. The case is an OWI/PAC/RCS or companion citation transferred to Circuit Ct for a jury trial

§ 800.14

c. The case has been appealed from Municipal Ct

d. The case has been transferred to Circuit Ct because no municipal judge is available

e. Case is assigned to Milwaukee Municipal Court and court is not in session

f. Equitable relief is demanded by the municipality

B. Personal jurisdiction

§ 345.11(2), (5)

1) Use of Uniform Traffic Citation (on paper or in automated format) by any peace officer adequate process to give Ct jurisdiction

2) Uniform Traffic Citation must be used for

§ 345.11(1)

a. Moving traffic violation

§ 345.11(1m)

b. Snowmobile violations (Ch 350)

§ 345.11(1s)

c. Loaded firearm or strung bow violations if committed on highway (§ 167.31(2)(b), (c), or (d))

3) Uniform Traffic Citation may be used for

§ 345.11(1)

a. Parking violations

§ 345.11(1)

b. Motor transport laws (Ch 194)

§ 345.11(1g)

c. Motor vehicle dealer (§ 218.0114(1)) and motor vehicle salvage dealer (§ 218.205(1)) licensing requirements

§ 345.11(1u)

d. Littering offense (§ 287.81)

§ 345.11(1r)
§ 23.33
§ 23.335

e. All-terrain vehicle (ATV), utility terrain vehicle, and off-highway motorcycle violations

§ 345.11(1j)

f. Transporting aquatic plants or animals in navigable waters

2. Venue

§ 971.19(1)

A. In Cty where violation committed

§ 971.19(2)

B. Where two or more acts required for violation, in any Cty where any such act occurred

§ 971.19(3)

C. If act committed within 1/4 mile of Cty line, in either Cty

§ 175.40(4)
City of Brookfield
v Berghauer
170 Wis. 2d 603
(Ct. App. 1992)

D. Entire width of boundary/highway intersection may be enforced by a peace officer from either jurisdiction

§ 971.19(4)

E. If offense committed "in, on or against any vehicle passing through or within" Wis, and it cannot readily be determined in which Cty venue lies

1) In any Cty through which vehicle passed, or

2) In Cty where travel commenced, or

3) In Cty where travel terminated

§ 971.19(5)

F. If act causing death in one Cty and death ensues in another, in either Cty

§ 971.19

G. Any other basis for venue in a criminal case applies

§ 345.31

H. For civil violations

1) All of the above apply

2) Any other basis for venue under the Criminal Code applies

3) Or plaintiff may bring action where Def resides

3. Criminal Traffic Violations

§ 939.12

A. Offenses under Traffic Code that are punishable by fine or imprisonment are crimes and entitle Def to

1) Trial by 12-person jury

2) Ct-appointed counsel

3) Proof beyond reasonable doubt

4) Be charged on criminal complaint

4. Initial Appearance—Defendant Appears

A. Def to be informed of rights

1) **Forfeiture actions**: Inform Def of

§ 345.34(1)

a. Right to jury trial

§ 345.43

- Upon request of either party within 10 days after entry of plea

City of Fond du Lac v Kaehne 229 Wis. 2d 323 (Ct. App. 1999)

- 10-day period commences when Def appears in Ct to enter plea or when written not guilty plea is received by Ct, even if received before initial appearance

§ 345.425(1)

- Upon payment of fees

- Otherwise right waived

§ 345.34(1)

b. Right to continuance

- If Def not ready to plead

§ 345.27(2)

c. Consequences of conviction

- Revocation or suspension of license

- Number of demerit points that may be assessed

2) **Criminal actions**: Inform Def of

§ 970.02(1)(a)

a. Charge

- Provide Def with copy of complaint
- Complaint must contain penalties for offense
- Oral reading of complaint may be waived

§ 970.02(1)(a)

b. Penalties, if felony charged

§ 970.02(1)(b)

c. Right to counsel

- Counsel must be appointed if Def indigent

d. Right to jury trial

§ 970.02(1)(c)

e. Right to prelim if felony charge

f. Right to bail in accordance with Ch 969

B. Entry of plea

1) Form of plea

§ 345.34(1)

a. Def may plead guilty, not guilty, or no contest

2) Criminal charge

a. Def must plead in person before Judge

§ 971.02(1)

b. In felony actions, plea deferred until arraignment following prelim or waiver

§ 345.34(3)

3) Civil forfeiture charge

a. Def may plead by letter, provided

- Letter sent to Judge at address indicated on summons or citation, and
- Letter shows Def's return address

§ 345.34(2)

b. If Def pleads guilty or no contest

- Ct must accept plea and find Def guilty

§ 345.47(1)

- Ct may enter monetary judgment
  - — Not to exceed maximum forfeiture, plus
  - — Costs, fees, and surcharges under Ch 814

§ 343.30(1)

c. Ct may suspend driving privileges for up to one year for violation of any traffic offense, except certain violations (**See Ch. TR 3, Sec. 1.D.**) involving death or great bodily harm for which DOT must suspend the privileges

§ 345.47(2)

d. Ct may suspend or defer payment of judgment

- For not more than 60 days
- Within discretion of Ct

St ex rel Pedersen v Blessinger 56 Wis. 2d 286 (1972)

e. Ct must suspend, defer, or extend time to pay judgment if Def indigent

§ 973.05(3)
§ 346.65(2g)

f. In OWI/RCS/PAC cases, Ct may impose community service in lieu of part or all of forfeiture

§ 345.47(1)

g. Alternative penalty for nonpayment of up to 90 days in jail or up to 1-year suspension of license

§ 345.36(1)

4) If Def pleads not guilty in forfeiture action, Ct shall set future date for trial or advise Def that notice may be sent at a later date

§ 345.34(1)

5) If Def requests a continuance, Ct shall adjourn the arraignment without entering a plea

5. Initial Appearance—Defendant Does Not Appear

A. Forfeiture actions

§ 345.26

1) Def may post deposit in lieu of appearance at initial appearance

§ 345.37(2)

2) If deposit posted, but no plea entered by mail, Ct may

a. Deem failure to appear as plea of no contest and enter judgment for amount not to exceed amount of deposit, or

§ 345.37(2)

b. Issue summons under Ch 968 and subsequent warrant if no appearance after summons

§ 345.37(2)

c. Def may move to withdraw plea, reopen judgment, and enter plea of not guilty

- Within six months after date set for appearance
- Upon showing failure to appear because of mistake, inadvertence, surprise, or excusable neglect

§ 345.38

d. Forfeiture of deposit not admissible as admission against interest in any action arising from same occurrence

3) If deposit not posted and plea not entered by mail, Ct may

§ 345.37(1)(a)

a. Issue warrant for Def's arrest, or

§ 345.37(1)(b)

b. Enter plea of no contest and enter judgment against Def

- Promptly mail notice of default judgment to Def

§ 345.47(2)

- Judgment must allow at least 20 but not more than 60 days for payment

§ 345.37(1)(b)

c. Ct must reopen judgment if

- Def requests within 6 months after date set for appearance, and
- Def shows failure to appear because of mistake, inadvertence, surprise, or excusable neglect

§ 345.375(1)

4) Ct may enter default against corporation or LLC for failure to appear

B. Criminal actions

§ 968.09

1) Ct may authorize warrant for Def's arrest

6. Juveniles in Traffic Court

§ 938.17(1)

A. For 16 year olds, Traffic Ct (Circuit or Municipal) has exclusive jurisdiction over traffic, boating, snowmobile, ATV, utility terrain vehicle, and limited use off-highway motorcycle violations except

§ 342.06(2)

1) Making false statement in application for certificate of title

§ 344.48(1)

2) Forged or false proof of financial responsibility

§ 30.67
§ 346.67

3) Failure to render aid (hit-and-run) with boat or motor vehicle

§ 345.18

B. Persons under the age of 18 must be present for sentencing in traffic cases except

1) For parking violation, or

2) When stipulation of guilt or no contest accepted for violation of local ordinance, or

3) If Ct waives appearance for reasons of exceptional hardship

§ 938.17(1)

C. Juv convicted of traffic, boating, snowmobile, ATV, utility terrain vehicle, or limited use off-highway motorcycle offense treated as adult for sentencing purposes, except

1) Ct may disregard any minimum period of incarceration specified for offense

7. Substitution of Judge

A. Substitution in civil forfeiture cases

§ 345.315(1)

1) Written request required

§ 345.315(2), (5)

2) No more than one Judge disqualified, except following appeal or writ of error

§ 345.315(1)

3) Time constraints for request

a. Within 7 days after initial appearance of Def or Def's Atty

§ 345.315(1)

b. If new Judge assigned for trial without Def requesting substitution, Def may request substitution

- Within 10 days after notice of new Judge
- If notice less than 10 days before trial, within 48 hours after notice
- If notice less than 48 hours before trial, Def may make oral or written request for substitution before commencement of proceedings

§ 345.315(5)

c. Following appeal, if further proceedings necessary, Def may file request to substitute Judge within 20 days after appellate decision

- Request may be made even if Def previously requested substitution

§ 345.315(1m)

4) After receiving request for substitution, Judge to immediately determine whether request timely and in proper form

a. If timely and proper, Judge has no further jurisdiction and clerk must request assignment of new Judge

§ 345.315(1)

5) Judge substituted against may set initial bail and accept plea

B. Substitution in criminal cases

§ 971.20(4)

1) Written request required

§ 971.20(2), (7)

2) Def entitled to only one substitution, except following appeal

3) Time constraints for request

§ 971.20(3)(b), (4)

a. Def must request substitution

- 5 days before prelim
- Before making any motion

- Before arraignment

St ex rel Tinti v Waukesha Cty Cir Ct 159 Wis. 2d 783 (Ct. App. 1990)

- If Ct's intake system does not provide adequate notice of assigned Judge in advance of arraignment, time constraints are relaxed to provide Def with reasonable and intelligent opportunity to exercise right to substitution

§ 971.20(5)

b. If new Judge assigned without request of Def, Def may request substitution

- Within 15 days after notice, or
- If notice less than 20 days before trial, within 48 hours after notice, or
- If notice less than 48 hours before trial, Def may make oral or written request before commencement of proceedings

§ 971.20(8)

4) After receiving request for substitution, Judge must immediately determine whether request timely and in proper form

a. If timely and proper, Judge has no further jurisdiction and clerk must request assignment of new Judge

§ 971.20(9)

5) Judge substituted against may conduct initial appearance, accept plea, and set bail

8. Discovery Motions

§ 345.421

A. Civil forfeiture cases

1) Neither party entitled to pretrial discovery, except

a. Def may test or inspect any devices used by plaintiff to determine whether violation committed, e.g.,

- Speed-measuring devices
- Blood or breath alcohol-measuring devices

b. Def may inspect reports of experts regarding such devices

§ 345.421

2) Procedure

a. Def must make motion within 10 days after alleged violation

b. Def must show cause

§ 343.305(9)(a)

B. Discovery limited in refusal hearings. Neither party entitled to discovery, except, if cause shown, Ct may allow Def to inspect documents and test devices

C. Criminal cases—see CR 10, Discovery and Inspection

9. Operating a Motor Vehicle While Intoxicated

(OWI/RCS/PAC). The offense commonly referred to as OWI relates to three (3) separate, but interrelated offenses:

§ 346.63(1)(a)

A. Operating while under the influence of an intoxicant, controlled substance, controlled substance analog, or any combination of intoxicant, controlled substance, or controlled substance analog, or any other drug that renders person incapable of safely driving (OWI)

§ 340.01(25d), (20r)

1) "Intoxicant" includes a hazardous inhalant

§ 346.63(1)(am)
St v Luedtke
2015 WI 42
362 Wis. 2d 1
St v Smet
2005 WI App 263
288 Wis. 2d 525

B. Operating with detectable amount of restricted controlled substance in his/her blood (RCS)

1) "Restricted controlled substance" defined as:

§ 340.01(50m)

a. Controlled substance included in schedule 1 under Ch 961 other than tetrahydrocannabinol (THC)

NOTE: The definition of THC in Ch 961 is quite broad and could include metabolites of THC from much earlier consumption that would no longer affect a person's ability to drive. Consequently, the definition of THC from Ch 961 is not included in the definition of a "restricted controlled substance." However, an active component of THC is included as a restricted controlled substance (see below).

b. Heroin metabolite 6-monoacetylmorphine

c. Controlled substance analog, as defined in § 961.01(4m), of controlled substance described in para. a. *supra*

d. Cocaine or any of its metabolites

e. Methamphetamine

f. Delta-9-tetrahydrocannabinol, in an amount greater than 1 ng/ml

NOTE: Delta-9-tetrahydrocannabinol is the active component of THC that is detected in the blood. Its presence is indicative of recent consumption of THC.

§ 346.63(1)(d)

2) If restricted controlled substance is detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol, Def has defense if he/she proves by preponderance of evidence that, at time of incident, he/she had valid prescription for methamphetamine or one of its metabolic precursors, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol

§ 885.235(1k)

3) If chemical analysis of blood shows detectable amount of restricted controlled substance, Ct shall consider this prima facie evidence that person did have detectable amount of restricted controlled substance in his/her blood

a. No expert testimony is needed as to substance's effect

St v Luedtke
2015 WI 42
362 Wis. 2d 1

4) RCS is a strict liability offense

§ 346.63(1)(b)

C. Operating with a prohibited alcohol concentration (PAC)

§ 340.01(46m)(a)

1) First, second, and third offenses have PAC of 0.08% or more

§ 340.01(46m)(c)

2) Fourth and subsequent offenses have PAC of greater than 0.02%

§ 340.01(46m)(c)

3) If subject to an ignition interlock device (IID) order, PAC is greater than 0.02%

§ 346.63(2)(am)

D. Person may be charged with any combination of the above charges arising out of the same incident. If found guilty of any combination of above charges, there is a single conviction for purposes of sentencing

E. Counting Offenses

City of Kenosha v Jensen
184 Wis. 2d 91
(Ct. App. 1994)

1) If a Def has two first-offense OWI/RCS/PAC cases pending, and is convicted of EITHER offense, other offense MUST be prosecuted as criminal offense

City of Eau Claire v
Booth

2016 WI 65
370 Wis. 2d 595

2) Def forfeits right to challenge a first-offense conviction in Circuit Ct (that should have been a second) by failing to raise the objection in a timely manner

§ 800.09(4)
City of Cedarburg v Hansen
2020 WI 11
390 Wis. 2d 109

3) Def forfeits right to challenge a first-offense conviction in Municipal Ct (that should have been a second) by failing to raise issue in writing and with specificity before entry of municipal judgment

St v Matke
2005 WI App 4
278 Wis. 2d 403

4) Number of prior convictions determined as of time of sentencing, not at time of offense

Note: Wis Ethics Opinion E-86-6

5) Defense counsel does not have affirmative duty to disclose to Ct or prosecutor that there are two first-offense cases pending, unless specifically asked by Ct or prosecution

§ 346.65(2)(f)

F. Minor passenger—If there is a minor passenger under 16 years of age in the motor vehicle at the time of the violation, the applicable minimum and maximum fines and imprisonment are doubled

1) 1st offense with minor passenger under 16 is a criminal offense

2) 3rd and subsequent offense with minor passenger under 16 is a felony

10. Motions: In General

A. Motion to dismiss for failure to state probable cause in complaint

St v White
97 Wis. 2d 193 (1980)

1) Criminal cases require formal complaint

a. Uniform Traffic Citation insufficient to confer personal jurisdiction of Ct when Def charged with traffic misdemeanor

2) For challenges to sufficiency of criminal complaint see **CR 15**

B. Motion by prosecutor to dismiss or amend

§ 967.055(1)(a)

1) The legislature intends to encourage the vigorous prosecution of offenses concerning OWI

§ 967.055(2)(a)
St v Corvino
2016 WI App 52
370 Wis. 2d 681

2) If a prosecutor seeks to dismiss or amend an OWI charge or refusal, the prosecutor must apply to the Ct. The Ct may approve the application only if the Ct finds that the proposed amendment or dismissal is consistent with the public's interest in deterring OWI

C. Motion to dismiss for lack of reasonable suspicion for stop or probable cause to arrest

St v Rutzinski
2001 WI 22
241 Wis. 2d 729

1) Investigatory stop of vehicle does not require probable cause for arrest. It may be based on reasonable suspicion that driver or occupants have committed, or are about to commit, an offense. Reasonable suspicion is more than unparticularized suspicion or a "hunch"

St v Lange
2009 WI 49
317 Wis. 2d 383
St v Swanson
164 Wis. 2d 437 (1991)

2) Probable cause to believe that offense committed exists when

a. Facts and circumstances of offense within officer's knowledge, and

b. Such facts and circumstances based on reasonably trustworthy information, and

c. Such facts and circumstances sufficient in themselves to warrant person of reasonable caution to believe offense committed

Cty of Jefferson v Renz
231 Wis. 2d 293 (1999)

3) PBT may be used to establish probable cause for arrest. Officer must have more than a reasonable suspicion that person may be operating while under the influence, but does not need probable cause to arrest to request a PBT as a screening device

§ 343.303
Fisher v
Ozaukee Cty Cir Ct
741 FSupp2d 944
(ED Wis 2010)

a. Although PBT result is generally NOT admissible at trial, expert's opinion concerning Def's blood alcohol level may be admissible even if it relies on PBT result

St v Goss
2011 WI 104
338 Wis. 2d 72

b. If Def's PAC is .02%, odor of alcohol may be sufficient to request a PBT

Recommendation

4) In non-jury case, consider scheduling evidentiary hearing on motion concurrently with trial

St v Wille
185 Wis. 2d 673
(Ct. App. 1994)

D. Probable cause determination at earlier refusal hearing does not preclude Def from raising same issue on main charge

1) Burden of persuasion is much greater at suppression hearing than at a refusal

St v Schneck
2002 WI App 239
257 Wis. 2d 704

E. Summary judgment not available to either party in civil forfeiture action

F. For challenges based on double jeopardy, see CR 15, Sec. 5, this volume

11. Motions Challenging Elements of "Operation," "Operating on Premises Held out to the Public," and "Motor Vehicle"

A. Operation

§ 346.63(3)(b)

1) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion

Milwaukee Cty v Proegler
95 Wis. 2d 614 (1980)

2) No requirement that prosecution establish intent to drive or move vehicle. Proof of operation sufficient when Def started vehicle and fell asleep behind the wheel with the engine running

Vill of Cross Plains
v Haanstad
2006 WI 16
288 Wis. 2d 573

3) Sitting in driver's seat with engine running is not sufficient to prove operation, absent any other evidence that Def manipulated driving controls in some manner at some time

B. Premises held out to the public

§ 346.61

1) OWI/RCS/PAC and reckless driving statutes apply to all premises held out to the public for use of their motor vehicles and all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing buildings of 4 or more units for use of their motor vehicles

St v Tecza
2008 WI App 79
312 Wis. 2d 395

2) When determining whether a particular location is "held out to the public for use of their motor vehicles," appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the location in an authorized manner

St v Koeppen
2014 WI App 94
356 Wis. 2d 812

C. Definition of motor vehicle—a "motor bicycle" is a "motor vehicle" when it is being self-propelled by the motor rather than by pedaling

St v Shoeder
2019 WI App 60
389 Wis. 2d 244

D. A riding lawn mower is a motor vehicle

12. Suppression Motions

A. Motion to suppress field sobriety tests

St v Babbitt
188 Wis. 2d 349
(Ct. App. 1994)

1) Field sobriety tests not testimonial

City of W Bend v Wilkens
2005 WI App 36
278 Wis. 2d 643

2) Field sobriety tests do not need to be approved by NHTSA to be admissible

St v Mallick
210 Wis. 2d 427
(Ct. App. 1997)

3) Evidence of refusal to perform field sobriety tests not suppressible under US Const 5th Amendment or Wis Const art I, § 8

a. Def's refusal to submit to field sobriety tests is admissible for purpose of establishing probable cause and at trial to show consciousness of guilt

B. Motions requesting suppression of chemical test results or challenging statutory automatic admissibility of test results

§ 343.305(4)

1) Failure to notify Def of rights under implied consent law. *See also infra* **Sec. 13**, **Motions: Relating to "Informing the Accused Form"**

2) Failure to provide alternative or additional test

§ 343.305(5)

a. If Def submits to primary test as requested by law enforcement, Def may request

- Alternative test provided, and paid for, by the agency; or,
- At Def's expense, reasonable opportunity for an additional test

b. Remedy for failure to provide, or obtain, second test

§ 343.305(5)

- Failure, or inability, of Def to obtain a test at own expense does NOT preclude the admission of the primary test

St v Zielke
137 Wis. 2d 39 (1987)
St v McCrossen
129 Wis. 2d 277 (1986)

- Case law does not consistently outline remedy. Suppression of primary test or loss of automatic admissibility of primary test are options for trial Ct

St v Batt
2010 WI App 155
330 Wis. 2d 159

c. Implied consent law requires police, if requested, to provide either an alternative test at police expense, or an alternative test that Def selects and pays for, but not both

St v Stary
187 Wis. 2d 266
(Ct. App. 1994)

d. Officer must make "reasonably diligent" effort to provide Def with alternative test. If Def refuses to take alternative test, officer does not have continuing obligation to remain available to accommodate future requests for alternative test

St v Vincent
171 Wis. 2d 124
(Ct. App. 1992)

e. Requirement that officer provide "reasonable opportunity" for Def to have additional test of own choosing does not require officer to transport Def

St v Schmidt
2004 WI App 235
277 Wis. 2d 561

f. Request for an additional test may be made either before or after taking the primary test, but the request must be made specifically and clearly

St v Fahey
2005 WI App 171
285 Wis. 2d 679

g. Request for an alternative test at agency expense that is made after being released from custody is NOT a valid request

St v Thurk
224 Wis. 2d 662
(Ct. App. 1999)

h. Alternative test not required if initial test not given under implied consent law (e.g., if blood drawn pursuant to 4th Amendment search)

3) Test administered outside 3-hour time limit

§ 885.235(3)

a. Requires foundation of expert testimony to establish probative value

§ 885.235(1g)

- Tests within 3 hours after driving admissible without expert testimony

4) Failure to obtain two separate breath samples

St v Grade
165 Wis. 2d 143 (1991)

a. Provides basis for suppression of "partial or single" breath test result

5) Destruction of blood sample before testing by defense

St v Luedtke
2015 WI 42, ¶ 7
362 Wis. 2d 1

a. Destruction of blood sample before Def had opportunity to independently test does not necessarily violate due process

Arizona v Youngblood
109 SCt 333 (1988)

- Prosecution must preserve evidence that is "apparently exculpatory"

St v Luedtke
2015 WI 42, ¶ 7
362 Wis. 2d 1

- Def must show bad faith on part of police for failure to preserve "potentially exculpatory" or useful evidence

6) Violation of patient-physician privilege

§ 905.04(4)(f)

a. Results of tests or circumstances surrounding chemical tests for intoxication not privileged

St v Straehler
2008 WI App 14
307 Wis. 2d 360

b. Even if HIPAA confidentiality requirements applied to nurse's conversation with police officer about Def's condition and admission to drinking, violation would not require remedy of suppression

7) Blood improperly withdrawn

§ 343.305(5)(b)

a. Blood may only be withdrawn by a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician

St v Penzkofer
184 Wis. 2d 262
(Ct. App. 1994)

b. Blood sample drawn by lab assistant is "under the direction of a physician" if hospital has detailed written procedures for assistant to follow

St v Kozel
2017 WI 3

373 Wis. 2d 1

c. Blood sample drawn in a room at the jail by an EMT authorized in writing by a physician to draw blood complied with the statute and was constitutionally reasonable

St v Wiedmeyer
2016 WI App 46
370 Wis. 2d 187

8) Testing of blood by a facility that does not meet the technical permitting requirements outlined in § 343.305(6)(a) does not preclude admissibility under other statutory provisions

St v Randall
2019 WI 80
387 Wis. 2d 744

9) Driver who consents to blood draw has no right to withdraw consent to subsequent testing of the blood

10) Tests obtained without consent, after refusal, or from unconscious Def

Missouri v McNeely
133 SCt 1552 (2013)
Schmerber v California
86 SCt 1826 (1966)
St v Howes
2017 WI 18, ¶¶ 34, 45–47
373 Wis. 2d 468

a. Forced blood withdrawal may be reasonable under 4th Amendment. The natural dissipation of alcohol does NOT, by itself, constitute an exigency. This must be determined by the "totality of the circumstances." Factors to be considered include:

- Legal PAC applying to Def
- Severity of Def's injuries and nature of medical treatment
- Length of time between driving and law enforcement obtaining probable cause to arrest for OWI

St v Dalton
2018 WI 85
383 Wis. 2d 147
St v Tullberg
2014 WI 134
359 Wis. 2d 421

- Time spent by law enforcement investigating an accident, including witness interviews and securing evidence from the scene
- Time spent transporting an injured suspect to a hospital
- Procedures and time involved in obtaining a warrant

St v Dalton
2018 WI 85
383 Wis. 2d 147
St v Tullberg

2014 WI 134
359 Wis. 2d 421

- Length of time between the driving and the taking of the sample, including imminent closure of the 3-hour window

St v Hay
2020 WI App 35
392 Wis. 2d 845

- Availability of backup officers to perform tasks

§ 968.13(1)

b. Search warrant for blood may be issued in ALL OWI cases: criminal and non-criminal.

St v Prado
2021 WI 64
397 Wis. 2d 719

c. Unconscious-driver provisions of implied consent law are unconstitutional, although good-faith or exigent-circumstances analyses could apply

Mitchell v Wis
139 SCt 2525 (2019)

d. Rebuttable presumption of exigent circumstances for warrantless blood draw when probable cause exists for OWI and driver is unconscious

St v Richards
2020 WI App 48
393 Wis. 2d 772

- State has burden to show:
  - — Probable cause that Def committed an impaired-driving offense
  - — Def unconscious
  - — Unconsciousness requires transport to hospital
  - — Def taken to hospital before reasonable opportunity to administer a standard evidentiary breath test
- If State proves these factors, burden shifts to Def to show:
  - — Blood would not have been drawn if police not seeking BAC information
  - — Police could not have reasonably judged that warrant application would interfere with pressing needs or duties

C. Motions to suppress evidence of refusal to take chemical test

South Dakota v Neville
103 SCt 916 (1983)

1) No duty to inform Def that refusal may be offered as evidence

2) Failure to inform Def of *Miranda* warnings and provide counsel

St v Neitzel
95 Wis. 2d 191 (1980)

a. No duty to inform Def or provide counsel before taking chemical test

St v Zielke
137 Wis. 2d 39, 51 (1987)
St v Algaier
165 Wis. 2d 515
(Ct. App. 1991)

3) Failure to inform Def in accordance with § 343.305 results in suppression of Def's refusal at trial

D. Motion to suppress statements (criminal traffic case)

1) Failure to inform Def of *Miranda* warnings during routine traffic stop

Berkemer v McCarty
104 SCt 3138 (1984)

a. Statements made during routine and normal traffic stop not custodial and not subject to *Miranda*

b. If Def taken into custody, see **Suppression—Confessions**, **CR 21**

13. Motions: Relating to "Informing the Accused" Form

A. Failure to advise Def as required by § 343.305

St v Zielke
137 Wis. 2d 39 (1987)
St v Wilke
152 Wis. 2d 243
(Ct. App. 1989)

1) State forfeits opportunity to revoke Def's license for refusing to take test

2) State forfeits "automatic admissibility of test result"

3) State forfeits admissibility of Def's refusal at trial

St v Heimbruch
(In re Refusal of
Heimbruch)
2020 WI App 68
394 Wis. 2d 503

4) Officer meets duty when statutory form read to the accused driver, despite form misstating the law, if inaccurate information does not apply to driver

Washburn Cty v Smith
2008 WI 23

308 Wis. 2d 65
Cty of Ozaukee v Quelle
198 Wis. 2d 299
(Ct. App. 1995)

5) A three-part standard is to be applied in assessing adequacy of warning process under implied consent law

a. Has the officer not met, or exceeded, his/her statutory duty to provide information to the accused driver? (Was the form read? Did the officer further explain or elaborate on the form?)

b. Is the lack or oversupply of information misleading?

c. Has the failure to properly inform the driver affected his/her ability to make the choice about chemical testing?

St v Piddington
2001 WI 24
241 Wis. 2d 754
St v Begicevic
2004 WI App 57
270 Wis. 2d 675

6) Police must make "reasonable" attempt to convey § 343.305 warnings according to individual circumstances of situation. Focus is on whether reasonable efforts were made to convey warnings, NOT whether warnings were actually understood

St v Levanduski
2020 WI App 53
393 Wis. 2d 674

B. Informing the Accused form accurately states that refusal to perform testing can be used against driver in Ct; form does not render consent involuntary

St v Reitter
227 Wis. 2d 213 (1999)
St v Neitzel
95 Wis. 2d 191 (1980)

C. No right to Atty when deciding whether to take test and no right to be informed of lack of right to Atty

St v Kliss
2007 WI App 13
298 Wis. 2d 275

1) But *Miranda* warnings given before reading Informing the Accused form may imply right to counsel

14. Implied Consent and Refusals

A. Officer may request operator to provide one or more samples of breath, blood, or urine if:

§ 343.305(3)(a)

1) Operator arrested for OWI/RCS/PAC or

§ 343.305(3)(ar)1.

2) Operator involved in accident that causes substantial bodily harm and officer detects any presence of alcohol or controlled substances, or

§ 343.305(3)(ar)2.
St v Blackman
2017 WI 77
377 Wis. 2d 339

3) Operator involved in an accident that causes death or great bodily harm and the officer has reason to believe that the person violated any state or local traffic law

§ 343.305(9)(a)4.

B. If refusal, Def may request hearing in writing and within 10 days after issuance of "Notice of Intent to Revoke"

St v Carlson
2002 WI App 44
250 Wis. 2d 562

1) Do not count holidays and weekends

Vill of Elm Grove v Brefka
2013 WI 54
348 Wis. 2d 282

2) Ct lacks competency to hear a motion to extend 10-day time limit

C. If Def requests hearing within 10 days

§ 343.305(9)(c)

1) Hold hearing to determine whether refusal proper

§ 343.305(9)(b)

2) "Notice of Intent to Revoke" issued by officer adequate process to provide Ct with jurisdiction over person

§ 343.305(9)(a) (intro.)

3) Neither party entitled to discovery, except, if cause shown, Ct may allow Def to inspect documents and test devices

§ 343.305(9)(a)5.

4) Scope of hearing limited to following issues

St v Anagnos
2012 WI 64
341 Wis. 2d 576

a. Whether officer had probable cause and lawfully stopped and arrested Def

b. Whether officer informed Def in compliance with § 343.305(4). (*See* **Sec. 13.A.** above)

c. Whether Def refused test

§ 343.305(9)(a)5.c.
St v Spring
204 Wis. 2d 343
(Ct. App. 1996)

- Refusal when Def agrees with officer to take blood test but refuses to sign hospital release of liability form

§ 343.305(6)(c)3.

- Failure to provide 2 separate, adequate breath samples in proper sequence constitutes refusal

Vill of Elkhart Lake v Borzyskowski
123 Wis. 2d 185
(Ct. App. 1985)

- Conduct may constitute refusal

St v Rydeski
214 Wis. 2d 101
(Ct. App. 1997)

- No right to recant a refusal

d. Whether Def refused because of physical inability to submit to test

§ 343.305(9)(a)5.c.

- Applicable only when inability caused by disability or illness unrelated to use of alcohol or controlled substances

- Def deemed not to have refused, if preponderance of evidence shows physical inability to submit to test

§ 343.305(9)(d)

5) Ct must determine issues within 5 days

§ 343.305(9)(am)
§ 346.65(2u)(c)

6) Similar procedure applies for refusal to submit to test by operator of CMV

St v Bentdahl
2013 WI 106
351 Wis. 2d 739
St v Brooks
113 Wis. 2d 347 (1983)

7) Absent a hearing on the merits, Ct has limited discretionary authority to dismiss refusal

a. Request for refusal hearing must be timely

b. Def must have pleaded guilty to underlying OWI

§ 343.305(9)(a)

D. Municipal Cts have authority to conduct refusal hearings if arrest was for violation of municipal ordinance and municipality has a Municipal Ct

§ 800.035(5)(c)

1) If Def makes a timely request for a jury trial AND timely request for a refusal hearing, OWI citation and refusal are BOTH transferred to Circuit Ct

E. If Def does NOT request hearing, or if all issues determined adversely to Def

1) Revoke DL

§ 343.305(10)(b)2.

a. For 1 year, if first refusal and no prior OWI/RCS/PAC convictions

§ 343.305(10)(b)3.

b. For 2 years, if number of refusals, suspensions, and convictions equals 2, and both occurred within 10-year period

§ 343.305(10)(b)5.

- 10-year period measured from dates of refusals or violations

§ 343.305(10)(b)4.
1997 Wis Act 237,
§ 9348(2f)

c. For 3 years, if number of refusals, suspensions, and convictions equals 3 or more, and all occurred after 1/1/1989

§ 343.305(10)(b)4m.

d. If minor passenger under 16 in motor vehicle, minimum and maximum revocation periods are doubled

§ 343.305(10)(c)

2) Order assessment of Def's use of alcohol or controlled substances

§ 343.305(10m)

3) Ignition Interlock Devices (IID)

a. Follow same procedures as if convicted of OWI/RCS/PAC (*see* **TR 3, Sec. 2.H.**)

15. Administrative Suspension

A. Prohibited PAC varies with number of priors

§ 340.01(46m)(a)

1) Persons with 2 or fewer prior OWI/RCS/PAC offenses—.08% and above

§ 340.01(46m)(c)

2) Persons with 3 or more prior offenses—.02% and above (in effect, absolute sobriety required)

§ 343.305(7)(a)

B. If Def submits to chemical test that shows PAC, officer must

§ 343.305(8)(a)

1) Issue "Notice of Administrative Suspension" advising Def of administrative suspension and rights to administrative and judicial review

a. "Notice" serves as temporary license for 30 days

§ 343.305(7)(b)

C. If Def operating CMV submits to chemical test and result indicates any measured alcohol above 0.0%, officer must

1) Issue out-of-service order to Def for 24 hours after test

§ 343.305(7)(a)
§ 343.305(8)(a)

D. Def administratively suspended for 6 months based on test result of above PAC or detectable amount of restricted controlled substance in blood

1) Suspension effective at time 30-day temporary license expires

2) Length of administrative suspension is 6 months regardless of any prior convictions for OWI/RCS/PAC

§ 343.305(8)(b)1.

E. Def may seek DOT review of administrative suspension

1) Request for review must be made within 10 days after "Notice of Administrative Suspension"

2) Hearing to review suspension must be scheduled within 30 days after "Notice of Administrative Suspension"

3) Hearing held in Cty where offense occurred or nearest office of DOT, unless hearing is by remote communication mechanism or record review. Def may request that DOT conduct hearing by telephone, videoconference, or other remote communication mechanism or by record review

4) Def may be represented by counsel at administrative hearing

5) Def may present evidence

6) Arresting officer need not appear at hearing unless subpoenaed under § 805.07 and need not appear in person at hearing conducted by remote communication mechanism or record review

7) Hearing officer must have copy of officer's report and results of chemical test

§ 343.305(8)(b)2.

8) Hearing issues limited to

a. Correct identity of person

b. Whether person informed of options regarding tests under § 343.305(4)

c. Whether person had PAC at time offense allegedly occurred or had detectable amount of restricted controlled substance in blood

d. Whether one or more tests administered in accordance with implied consent law

e. Whether each test result indicated person had PAC or detectable amount of restricted controlled substance in blood

f. Whether probable cause existed for arrest

g. Whether Def operating CMV (if applicable)

h. Whether Def had valid prescription for methamphetamine (or a metabolic precursor) or gamma-hydroxybutyric acid or delta-9-tetrahydrocannabinol, if § 343.305(8)(b)4m.a. and b. apply

§ 343.305(8)(b)6.

9) If criteria satisfied, administrative suspension continues

§ 343.305(8)(d)

a. Def eligible for occupational license under § 343.10

10) If criteria not satisfied, administrative suspension rescinded

§ 343.305(8)(b)1.

11) Administrative review not subject to Ch 227

§ 343.305(8)(c)

F. If Def aggrieved by determination of hearing examiner, may request review by Ct hearing underlying charge

§ 343.305(8)(c)1.

1) Request for judicial review must be filed with Ct within 20 days after hearing examiner's decision

a. Ct must notify DOT of request

2) Judicial review shall occur at time of trial on underlying offense

3) Prosecutor of underlying offense must represent interests of DOT at review hearing

§ 343.305(8)(c)4.

4) Request for judicial review does not stay administrative suspension order. However,

§ 343.305(8)(c)2.

a. DOT will vacate administrative suspension if not notified of result of judicial review within 60 days after request for judicial review

§ 343.305(8)(c)3.

G. If Def aggrieved by order of Municipal Ct, may appeal to Circuit Ct for Cty where offense occurred

§ 343.305(8)(c)3.

H. If Def aggrieved by order of Circuit Ct, may appeal to Ct of Appeals

§ 343.30(1q)(h)

I. Any period of suspension or revocation as a result of conviction for OWI/RCS/PAC charges is reduced by any period of administrative suspension, if both arise from same incident, but this calculation is performed by DOT

Recommendation

J. Treat request for judicial review as request for trial ASAP

1) Schedule underlying charge for trial within 60 days

a. Will significantly reduce any negative impact on Def by providing timely opportunity to present any legitimate issues concerning underlying offense or administrative suspension

b. Will discourage Defs from filing request for judicial review simply to limit administrative suspension to 60 days or less

2) Result of trial will resolve all issues relating to judicial review of administrative suspension

16. Commercial Motor Vehicle Law

§ 343.05(2)

A. Commercial Driver's License (CDL) required to operate Commercial Motor Vehicle (CMV) on highway, except

§ 343.055(1)(b)

1) Fire fighters when driving properly equipped emergency equipment

§ 343.055(1)(e)

2) Law enforcement officers when driving authorized emergency vehicles equipped with proper emergency equipment

§ 343.055(1)(d)

3) Drivers of recreational vehicles, provided driver owns or leases vehicle and not using it in connection with commercial activity

§ 343.055(1)(c)

4) Farmers when driving CMV owned or leased by farmer, provided vehicle

a. Not used in "for hire" carriage

b. Transporting farm supplies, produce, or machinery to or from farm, and

- Farm supplies may include hazardous materials

c. Within 150 miles of farm

§ 343.05(4)(a)1.

5) Persons in armed services while operating motor vehicle owned or leased by federal government

§ 343.05(4)(a)2.

6) Persons moving farm tractors or implements of husbandry between farm and field

§ 343.05(4)(a)3m.

7) Persons operating motorized construction equipment

a. Exemption does not apply to trucks or construction vehicles designed for use on roadway or to any vehicles exceeding 35 mph

§ 343.055(4)

B. Operators of CMVs exempt from CDLs still subject to alcohol prohibitions that apply to operators of CMVs (See Alcohol CMV Offenses in Sec. K below)

C. CMV is any motor vehicle designed or used to transport passengers or property that has one or more of following characteristics

§ 340.01(8)(a)

1) Single vehicle with gross vehicle weight rating of 26,001 or more pounds, or vehicle's registered or actual gross weight more than 26,000 pounds

§ 340.01(8)(b)

2) Combination vehicle with gross combination weight rating, registered weight or actual gross weight of 26,001 pounds or more

a. Inclusive of towed unit with gross weight rating, registered weight or actual gross weight of more than 10,000 pounds

§ 340.01(8)(c)

3) Designed to transport or actually transporting driver and 15 or more passengers

§ 340.01(8)(d)

4) Any size vehicle that requires hazardous materials placards

§ 343.05(2)(a)1.
§ 343.04(1)

D. Three separate classes of CDLs

1) Class A—For combination CMVs over 26,000 pounds, provided towed unit over 10,000 pounds

2) Class B—For single CMVs over 26,000 pounds towing trailers under 10,000 pounds

3) Class C—For motor vehicles below 26,000 pounds that carry 16 or more passengers or transport hazardous materials requiring placarding

§ 343.05(2), (5)(am)

E. Operating CMV without CDL is crime punishable by

§ 343.05(5)(am)1.

1) First offense—$200 to $600 fine or up to 6 months in jail or both

§ 343.05(5)(am)2.

2) Second offense—$300 to $1,000 fine or 5 days to 6 months in jail or both

§ 343.05(5)(am)3.

3) Third offense—$1,000 to $2,000 fine or 10 days to 6 months in jail or both

4) Offenses computed by violation to violation date within 3-year period

F. Duties of CMV operators

§ 343.05(1)(a)

2) Must not have more than one driver's license

§ 343.05(5)

a. Punishable as crime (same penalties as operating CMV without CDL)

§ 343.245(2)(a)1., 2.

2) Must report convictions of all moving violations to Wis DOT and to employer

§ 343.245(4)(a)

a. Punishable by forfeiture not to exceed $2,500

§ 343.245(2)(b)

3) Must notify employer if CDL suspended, revoked, cancelled, or disqualified by end of first business day following notification

§ 343.245(4)(a)

a. Punishable by forfeiture not to exceed $2,500

§ 343.245(2)(c)

4) When applying for employment as CMV operator, must provide detailed employment history for past 10 years

§ 343.245(4)(a)

a. Punishable by forfeiture not to exceed $2,500

§ 343.245(3)(b)
§ 343.315(1m)

G. Employers of CMV operators may not knowingly permit employee to operate CMV if employee

1) Has suspended, revoked, or cancelled CDL, or

2) Has been disqualified from operating CMV, or

3) Is subject to out-of-service order in any state, or

4) Has more than one operator's license

5) Does not possess valid CDL properly endorsed to permit operation of vehicle

§ 343.315(1m)
§ 343.245(4)(b)

6) Violations of § 343.315(1m) are crimes punishable by fine up to $5,000 or 90 days in jail or both, and violations of § 343.245(3)(b) are punishable by fines of $2,750 to $25,000 or 90 days in jail or both

§ 343.245(3)(c)

H. No employer may allow an employee to operate CMV in violation of

1) Federal, State, local law, rule, or regulation relating to railroad crossings

§ 343.245(4)(c)

2) Violations of § 343.245(3)(c) are punishable by a forfeiture of no more than $10,000

§ 346.64(2)

I. Employers of CMV operators must fire, or change job duties of, employee convicted of operating CMV while under influence of intoxicant

§ 346.64(2)

1) Employee cannot be employed as operator of CMV within 6 months after conviction or during any period of disqualification

§ 346.65(4)

2) Employer can be fined $50 to $500, up to 6 months jail or both

§ 346.64(2)

3) Employer can forfeit $5 for each day operator illegally retained

J. Disqualification of CDL

§ 343.315(1g)

1) "Engaged in CMV-related activities" means:

a. Operating a CMV; or

b. Operating ANY vehicle if operator has ever held a CDL; has ever operated a CMV on a highway; or been convicted of a violation related to or disqualified from operating a CMV

2) 60-day disqualification

§ 343.315(2)(f)

a. Convicted of 2 serious traffic violations from separate incidents committed within 3-year period while operating CMV or ANY vehicle if person holds CDL. See definition of "serious traffic violation," at **Sec. J.6)**, *infra*

§ 343.315(2)(j)

b. Convicted of 1 railroad crossing violation

§ 343.315(2)(fm)

c. Providing false information on CDL application

3) 120-day disqualification

a. Convicted of 3 serious traffic violations from separate incidents committed within 3-year period while operating CMV or ANY vehicle if person holds CDL. See definition of "serious traffic violation," at **Sec. J.6)**, *infra*

§ 343.315(2)(j)

b. Convicted of 2 railroad crossing violations

§ 343.315(2)(a)

4) 1-year disqualification for following offenses in CMV or ANY vehicle

§ 343.315(2)(a)1., 1m.

a. Driving/operating CMV under influence of alcohol or other drugs in violation of § 346.63 or law of another state

§ 343.315(2)(a)2.

b. Driving/operating CMV with PAC of .04 or more or ANY vehicle with PAC of .08 or more

§ 343.315(2)(a)3.

c. Leaving scene of accident

§ 343.315(2)(a)4.

d. Driving/operating in commission of felony

§ 343.315(2)(a)5.

e. Refusal to submit to chemical test

- If arrest was alcohol (or restricted controlled substance)-related

§ 343.315(2)(a)6.

f. Causing injury, great bodily harm, or death in OWI/RCS/PAC case (PAC .04 or above)

§ 343.315(2)(a)7.

g. Driving CMV while CDL is revoked, suspended, or cancelled, or while otherwise disqualified

§ 343.315(2)(a)8., (am)

h. Causing fatality by negligent or criminal operation of motor vehicle

§ 343.315(2)(b)

i. If any of above offenses involved transporting hazardous materials, or "any select agent" or "toxin" listed under 42 CFR pt 73, disqualification for 3 years

§ 343.315(2)(c)

j. Conviction for any 2 of above offenses (in paras. a.–h.) arising from separate incidents will result in disqualification for life

§ 343.315(2)(j)

k. Convicted of 3 or more railroad crossing violations, arising from separate occurrences while operating CMV, within 3 years

§ 343.315(2)(fp)

l. CDL is cancelled for obtaining or attempting to obtain a CDL by fraud

§ 343.315(2)(e)

5) Lifetime disqualification

a. In commission of felony involving controlled substances, Def is engaged in CMV-related activities

§ 343.315(2)(c)

b. Conviction for any 2 separate incidents listed as 1-year disqualifications in § 343.315(2)(a) or (am)

§ 343.315(2)(f)

6) "Serious traffic violations" are any of the following if committed while engaged in CMV-related activities specified in § 343.315(1g)(a) (operating a CMV), or any of the following offenses committed while engaged in CMV-related activities specified in § 343.315(1g)(b) (operating a non-CMV under specified circumstances) if the offense results in the revocation, cancellation, or suspension of the person's operating privilege:

§ 343.315(2)(f)1.

a. Speeding in excess of 15 miles per hour or more above posted speed limit

§ 343.315(2)(f)2.

b. Violation of State, tribal, or local law relating to motor vehicle traffic control arising in connection with fatal accident, other than parking, vehicle weight, or vehicle defect violations

§ 343.315(2)(f)3.

c. Reckless driving as defined under State or local law

§ 343.315(2)(f)4.

d. Erratic lane change

§ 343.315(2)(f)4.

e. Illegal passing

§ 343.315(2)(f)5.

f. Following too closely

§ 343.315(2)(f)6.

g. Operating CMV without having obtained a CDL

§ 343.315(2)(f)7.

h. Operating CMV without having CDL document in Def's possession

§ 343.315(2)(f)8.

i. Operating CMV without proper class of CDL or endorsements

§ 343.315(2)(f)9.

j. Composing or sending a text or e-mail message

§ 343.315(2)(f)10.

k. Using a hand-held mobile telephone

§ 343.315(3)

7) Disqualification does not affect regular (Class D) license if not otherwise revoked or suspended

K. Alcohol CMV Offenses

§ 346.63(1), (5)

1) Illegal to operate CMV while under the influence or with PAC of .08 or greater

§ 343.315(2)(a)

a. 1-year disqualification on first offense

§ 343.315(2)(c)

b. Lifetime disqualification on second and subsequent offenses

§ 346.63(5)
§ 346.65(2j)

2) Illegal to operate CMV with PAC of .04 or more and less than .08

a. Penalties for PAC between .04 and .08

§ 343.305(7)(b)

- Must be ordered out of service for 24 hours and

See § 346.65(2j)(am)2., 3.

- All prior OWI convictions count as priors (not just prior CMV-related OWI offenses)

§ 346.65(2j)(am)1.

- First offense—$150 to $300 forfeiture

§ 343.315(2)(a)2.

— 1-year disqualification

§ 346.65(2j)(am)2.

- Second offense within 10 years—$300 to $1,000 fine and 5 days to 6 months in jail

§ 346.65(2j)(am)3.

- Third offense—$600 to $2,000 fine and 45 days to 1 year in jail

§ 346.65(2j)(bm), (cm), (cr)

- Minimum period of imprisonment may be reduced for 2nd, 3rd, or 4th offender if Def successfully completes probation that includes alcohol and other drug treatment

§ 343.315(2)(c)

- Lifetime disqualification on second and subsequent offenses listed in § 343.315(2)(a) or (am) (no 10-year limit)

NOTE: All fees, costs, and surcharges are assessed on the above convictions.

§ 346.65(2j)(d)

b. If minor passenger in CMV at time of violation giving rise to conviction, applicable maximum and minimum forfeitures, fines, or imprisonment under § 346.65(2j)(am)1.–3. doubled

3) Illegal to operate CMV with PAC between .00 and .04

§ 346.63(7)(a)3.

a. Operator of CMV must not possess alcohol while on duty

§ 346.63(7)(a)2.

b. Operator of CMV must not be on duty within 4 hours after consuming alcohol

§ 346.63(7)(a)1.

c. Operator of CMV must not have any measured alcohol concentration above 0.0

§ 343.305(7)(b)
§ 346.65(2u)(b)

d. Must be ordered out of service for 24 hours, and

§ 346.65(2u)(a)

e. $10 forfeiture

§ 967.055(1)(a)

4) Limited authority of prosecutors to amend or dismiss OWI/RCS/PAC offense

§ 967.055(2)

a. Ct must find amendment or dismissal consistent with public's interest in deterring OWI/RCS/PAC offenses

§ 343.10(2)(c)

L. Occupational Licenses

1) No occupational license is possible for operating a CMV

TR 2: TRIAL PROCEDURES

1. Motions

§ 802.01(2)(a)
§ 971.30(2)

A. Motions should be in writing, stating grounds with particularity and relief sought

B. Motions *in limine*

1) Defined as preliminary or threshold motions

See Motion in limine
Black's Law Dictionary
(11th ed 2019)

2) Purpose: To raise evidentiary issues before trial so as to reduce possibility of error

a. To limit potentially inadmissible or prejudicial evidence

C. Trial motions

§ 906.15

1) Motion to sequester witnesses

§ 906.09

2) Motion to introduce evidence that witness convicted of crime

§ 805.14(3)
§ 972.10(4)

3) Motion to dismiss at end of plaintiff's case

a. Same criteria as in motion challenging sufficiency of evidence below

b. Ct must make findings of facts and conclusions of law on record

c. Grant motion to dismiss, if no credible evidence to support verdict for plaintiff

§ 903.03(2)

d. In criminal case, Judge not authorized to direct verdict or find or presume fact against Def

§ 805.14(1)
§ 972.10(4)

4) Motion challenging sufficiency of evidence at end of evidence

a. Test

- Consider all credible evidence and reasonable inferences in light most favorable to party against whom motion made
- Grant motion if no credible evidence to support verdict for opposing party

b. Can be made in writing or orally on record

c. Party making motion should state grounds with great particularity so adequate record made

d. Make specific findings of fact and conclusions of law on record

e. If motion granted

§ 805.14(3), (4)

- State grounds of dismissal with great particularity
- Enter judgment of acquittal

§ 805.14(4)

5) Motion for directed verdict in civil case

a. At close of all evidence, either party may challenge sufficiency of evidence as matter of law by motion to direct verdict in movant's favor

- View evidence in light most favorable to opposing party

- Must find as matter of law no issues for jury to decide

- Make specific findings of facts and conclusions of law in directing verdict

City of Omro v Brooks
104 Wis. 2d 351 (1981)

— When only 2 elements of city ordinance prohibiting OWI were intoxication and operation, and the 2 elements uncontested, Ct erred in failing to direct verdict of guilty

2. Civil Forfeiture Trials

A. Mode of trial

Wis Const art I, § 5
345.425

1) Right to jury trial subject to waiver or limitation

a. No jury trials in Municipal Ct

§ 800.035(5)(c)

b. Def may demand transfer of Municipal OWI case from Municipal to Circuit Ct

§ 345.43(1)

2) Trial to Ct, unless

a. Trial by jury demanded, and

b. Jury fees tendered

3) Jury demand must be in writing

City of Madison
v Donohoo
118 Wis. 2d 646 (1984)

a. Jury demand must be made within 10 days after entry of plea of not guilty

City of Fond du Lac
v Kaehne
229 Wis. 2d 323
(Ct. App. 1999)

b. 10-day period commences when Def appears in Ct to enter plea or when written not guilty plea is received by Ct, even if received before initial appearance

§ 345.43(1)

4) If no party demands trial by jury, right waived

St v Graf
72 Wis. 2d 179 (1976)

5) Def to pay jury fee prescribed in § 814.61(4)

St v Graf
72 Wis. 2d 179, 188
(1976)

6) Jury fee not refundable unless verdict in Def's favor

§ 756.06(2)(c)

7) 6-person jury empaneled

B. Special jury procedure

§ 345.43(1)
St v McGrew
2005 WI 130
285 Wis. 2d 519

1) 6-person jury

§ 345.43(3)(b)

a. If timely demand for jury made in Cty with population of less than 750,000

- Judge must direct clerk to select, randomly from current jury panel, names of sufficient jurors so that both parties may strike 5 names

- If either party neglects to strike out names, clerk must strike 5 names for the party

- Those not struck must appear for trial

b. Voir dire and challenges for cause permitted

§ 345.43(3)(a)
Chs 801–847

c. In Cty with population of 750,000 or more, use ordinary civil procedure for selecting jury

C. Trial procedures

§ 345.20(1)(b)

1) Civil "traffic regulation" action is one for which penalty is a forfeiture

§ 345.20(2)(a)

2) Procedure governed by provisions in §§ 345.21–345.53

§ 345.20(2)(a)

3) When no specific procedure is provided, Ch 799 (Small Claims) procedures apply

§ 906.14(1), (2)

4) Judge may call and examine witnesses or cross-examine witnesses called by parties

a. Caution: In jury trial, exercise extreme caution not to appear partisan

§ 805.17(2)

5) Trials to Ct

a. Ct to find ultimate facts, and

b. Ct to state conclusions of law

§ 345.45

D. Burden of proof

1) To a reasonable certainty by evidence that is clear, satisfactory, and convincing

3. Criminal Traffic Trials

A. Rules of Criminal Traffic trials are identical to those of any criminal trial

4. Admissibility of Driver Records

§ 909.02(4)

A. Driving records are self-authenticating when electronically certified by DOT

5. Forms of Verdict

§ 805.09(2)

A. Civil actions

1) Verdict valid if agreed to by 5 of 6 jurors of jury

2) Form of verdict is guilty or not guilty, except when necessary to determine speed or value, or BAC

Jackson v St
92 Wis. 2d 1
(Ct. App. 1979)

B. Criminal actions

1) Verdict in form of general verdict

2) Verdict must be agreed to unanimously by jury

§ 800.14

6. Municipal Court Appeals

§ 800.14(1)

A. Litigants in Municipal Ct have right to appeal from

1) Judgments,

2) Decisions on motions for relief from judgment, and

3) Determinations regarding whether Def unable to pay because of poverty

§ 800.14(1)

B. No appeal may be taken from a default judgment

§ 800.14(1)

C. Appellant must give Municipal Ct and other party notice of appeal and pay required fees within 20 days after judgment or decision

§ 800.14(3)

D. On perfection of appeal under § 800.14(2m), judgment or enforcement of Municipal Ct order stayed until final disposition of appeal unless otherwise ordered by Municipal Ct before transmittal or by Circuit Ct after transmittal

§ 800.14(4)

E. If trial was held, appeal from judgment shall be based on the record unless either party requests a new trial within 20 days after notice of appeal filed

1) New trial shall be to Ct unless either of the following applies:

§ 800.14(4)(a)

a. Def charged with OWI-related offense and municipality requests a 6-person jury and posts jury fees within 10 days after order for new trial

§ 800.035(5)(c)
§ 800.14(4)

- Def must use opportunity to transfer to Circuit Ct for 6-person jury at outset of Municipal Ct case

§ 800.14(4)(b)

b. Def not charged with OWI-related offense and either party requests a 6-person jury and posts fees within 10 days after order for new trial

§ 800.14(5)

F. If trial was not held, or if no request for new trial, appeal shall be based on review of the proceedings in Municipal Ct

1) Municipal Ct must transmit to Circuit Ct a copy of entire record, including any electronic recordings

§ 800.14(5)

G. If request for new trial, Municipal Ct shall transmit as much of record as deemed appropriate, but must include a copy of the citation or complaint and the judgment

1) Record may be supplemented on request of either party or Circuit Ct

§ 800.14(5)

H. If testimony was recorded in Municipal Ct, Circuit Ct may order preparation of written transcript of proceedings by any qualified Ct reporter at the cost of the appellant

§ 800.14(5m)

I. Def claiming inability to pay appeal, jury, or transcript fee may petition the Circuit Ct for a waiver

§ 800.14(6)

J. Circuit Ct must certify disposition of appeal to Municipal Ct within 30 days after Circuit Ct judgment

1) If disposition in Circuit Ct requires payment of forfeiture by Def, the forfeiture and all costs, fees, and surcharges shall be payable to the municipality

TR 3: SENTENCING—POSTCONVICTION ISSUES

1. Civil Traffic Forfeitures

A. Monetary penalties

§ 345.47(1)

1) Ct may enter monetary judgment

§ 345.47(2)

2) Ct may defer payment up to 60 days

St ex rel Pederson v Blessinger 56 Wis. 2d 286 (1972)

3) At time of sentencing, Ct should ascertain Def's ability to pay and consider imposition of alternative penalty in event of nonpayment

§ 345.47(1)

4) Ct shall notify Def personally, if present, or in writing, if not, that the Def should notify Ct if unable to pay because of poverty

§ 345.47(1)(b)

a. If Ct determines Def is unable to pay because of poverty, Ct may not suspend license for failure to pay without first providing an opportunity to pay in installments

§ 345.47(4)(b)

- If license already suspended for failure to pay (and Def has not previously failed to comply with installment payment plan), Ct must lift suspension and allow installment payments

§ 345.47(4)(c)

— If Def fails to comply with installment payments, Ct "shall" reinstate suspension of license for failure to pay

5) If Def fails to pay forfeiture

§ 345.47(1)(a)

a. Ct may impose jail for not more than 90 days or until judgment paid

§ 345.49(1)

- Work release possible on request

§ 345.47(1)(b)

b. Ct may suspend license for 30 days or until paid, but not to exceed 1 year

§ 778.30(1)(a)

c. Ct may convert to civil judgment

§ 778.30(1)(b)

d. Issue order assigning not more than 25% of the Def's earnings to Clerk of Circuit Ct for payment of unpaid forfeiture and costs

§ 778.30(2)(a)1.

- Clerk of Ct must provide notice of assignment to Def

73 OAG 24 (1984)

6) Imprisonment or suspension of license does not eliminate Def's liability to pay surcharge under § 346.655

B. Suspension of DL

§ 343.30(1)

1) Ct may suspend for up to 1 year for any violation of State traffic law or Ch 349 local ordinance, except for numerous violations (listed below in **Sec. 1.D.**) involving death or great bodily harm for which DOT must impose a suspension

§ 343.30(1n)
§ 346.57(4)(gm), (h)

2) Ct must suspend for 15 days if Def convicted of exceeding unposted 55 mph limit or 65 or 70 mph limit by 25 or more mph

§ 343.30(1p)
§ 346.63(2m)

3) Ct must suspend for 3 months if Def convicted of absolute sobriety law violation

C. Demerit points

§ 343.32(2)

1) DOT adopts rules for weighing seriousness of traffic convictions and assigns "points" to various offenses

§ 343.32(2)(c)

2) If Def accumulates 12 demerit points within 1-year period, by violation dates, DOT may suspend license

§ 343.32(5)
Wis Adm Code
§ Trans 101.07

3) Def may complete a DOT-approved course of instruction on driver safety or improvement to reduce point total by 3

Wis Adm Code
§ Trans 101.07(3)

a. Reduction allowed every 3 years

§ 343.32(4)

b. Def may also complete motorcycle rider course for motorcycle point reduction

§ 343.32(2)(bc)1.

4) Double demerit points to be assessed for second and subsequent violations of Ch 346 for probationary licenses

Wis Adm Code
§ Trans 101.02(8)(a)

5) If license suspended for too many points, upon reinstatement, the license will not be assessed any points

D. Other penalties imposed by DOT: Right-of-way course

§ 343.31(2t)(b)

1) DOT will order Def to attend a vehicle right-of-way course if Def convicted of the following violations:

a. § 346.05(1): Operating left of center

b. § 346.06: Failure to yield one-half of single-lane road

c. § 346.07(2): Unsafe cutting in while passing

d. § 346.07(3): Failure to yield to passing vehicle

e. § 346.09: Passing into oncoming traffic/on hill or curve/in no-passing zone/vehicle indicating left or U-turn

f. § 346.18: Failure to yield right-of-way violation

g. § 346.23: Failure to yield to pedestrian, personal delivery device, bicyclist, or rider of electric scooter or electric personal assistive mobility device

h. § 346.31: Improper turns/failure to follow indicated turn

i. § 346.37(1)(a)1.: Failure to yield right-of-way—green light/intersection/U-turn

j. § 346.37(1)(c)3.: Failure to yield right-of-way—red light

k. § 346.37(1)(d)1.: Failure to yield right-of-way—green arrow

l. § 346.39(1): Failure to stop for flashing red signal

m. § 346.46(1): Failure to stop/improper stop at stop sign

n. § 346.46(4)(a): Failure to stop/improper stop at stop sign (mid-block)

o. § 346.47(1): Failure to stop or yield emerging from alley or private drive

p. § 346.47(2): Failure to stop for intersecting alley

q. § 346.87: Unsafe backing of vehicle

§ 343.31(2t)(c)

2) Def must complete right-of-way course within 6 months

3) If Def does not complete course within 6 months, DOT will suspend license for up to 5 years or until course is completed

2. OWI

§ 346.65(2m)(a)

A. Factors to consider at sentencing

1) When imposing sentence for PAC or operating a motor vehicle with a restricted controlled substance (RCS), Ct shall review record and consider aggravating and mitigating factors. If amount of alcohol or amount of restricted controlled substance in Def's blood is known, Ct shall consider that amount as a factor in sentencing

2) The Chief Judge of each district shall adopt guidelines for the consideration of aggravating and mitigating factors

St v Jorgensen
2003 WI 105
264 Wis. 2d 157

a. Despite variance, guidelines are constitutional

St v Dalton
2018 WI 85
383 Wis. 2d 147

3) Ct may not impose more severe criminal penalties solely based on refusal to provide blood sample

B. Determining number of prior convictions

§ 346.65(2)(am)2., (2c)

1) By violation-to-violation date within 10-year period on 1st and 2nd offenses

St v Matke
2005 WI App 4
278 Wis. 2d 403

a. Number of prior convictions determined as of date of sentencing, NOT at time of offense

2) Following to be counted as priors

§ 343.307(1)(a)

a. In-State OWI conviction

St v Braunschweig
2018 WI 113
384 Wis. 2d 742

- Includes expunged convictions

§ 343.307(1)(b)

b. Convictions of federally recognized tribal law in conformity with § 346.63

§ 343.307(1)(c)

c. Convictions of injury by OWI, great bodily harm (GBH) by OWI, homicide by OWI

§ 343.307(1)(d)
St v White
177 Wis. 2d 121
(Ct. App. 1993)

d. Conviction for any out-of-state OWI law regulating use of a motor vehicle while intoxicated or refusal to take chemical test under similar terms

St v Jackson
2014 WI App 50
354 Wis. 2d 99
St v List
2004 WI App 230
277 Wis. 2d 836

- Includes "Ct supervision" or summary suspension in Illinois

St v Puchacz
2010 WI App 30
323 Wis. 2d 741

- Includes operating while "visibly impaired" in Michigan

St v Carter
2010 WI 132
330 Wis. 2d 1
St v Hirsch
2014 WI App 39
353 Wis. 2d 453

- Includes underage "absolute sobriety"/"zero tolerance" convictions in Illinois

St v Holder
2011 WI App 116
337 Wis. 2d 79

- Includes Michigan and Wisconsin OWI convictions stemming from one continuous stint of driving

§ 343.307(1)(e)

e. Out-of-state revocation or suspension for refusal to take chemical test

§ 343.307(1)(f)

f. Revocation for refusal to take chemical test under § 343.305(10)

St v Forrett
2022 WI 37

401 Wis. 2d 678

Exception: A revocation based on refusal to submit a blood sample, standing alone, may not form the basis for criminal penalties or increased penalties

§ 343.307(1)(g)

g. Aircraft-operation convictions for OWI/RCS/PAC under § 114.09(1)(b)1. or 1m.

City of Cedarburg v Hansen
2020 WI 11, ¶ 30
390 Wis. 2d 109
as modified on reconsideration
2020 WI 45
391 Wis. 2d 671

3) At sentencing, State has burden to prove prior conviction(s) by a preponderance of the evidence

St v Loayza
2021 WI 11
395 Wis. 2d 521

Competent proof includes certified driving records, prior acknowledgments of convictions, prior guilty pleas to charges enhanced by previous convictions, or admissions, personally or through counsel

Iowa v Tovar
124 SCt 1379 (2004)
St v Gracia
2013 WI 15
345 Wis. 2d 488
St v Ernst
2005 WI 107
283 Wis. 2d 300

4) Def may challenge use of prior convictions entered when Def not represented by counsel and no valid waiver of right to counsel

St v Clark
2022 WI 21
401 Wis. 2d 344

a. Def must establish prima facie case that Def did not knowingly, intelligently, and voluntarily waive right to counsel

- Def retains burden even if transcript unavailable

b. If so, burden shifts to State to prove waiver nonetheless

Lewis v US
100 SCt 915 (1980)

c. Collateral attack of prior conviction makes that conviction "uncountable" for determining range of criminal penalties on the new conviction, but does not affect civil consequences such as length of license revocation

St v Hahn
2000 WI 118
238 Wis. 2d 889

d. 1st-offense conviction cannot be collaterally attacked because no right to Atty on 1st offense

e. Successful collateral attack of prior criminal OWI does not affect the length of license revocation resulting from the current conviction. DOT will impose the full minimum revocation regardless of Ct order

§ 340.01(9r)
§ 343.23
§ 343.307

f. DOT will NOT remove a collaterally attacked conviction from DOT's records unless the prior conviction has been reopened and vacated by the original convicting Ct

St v Deilke
2004 WI 104
274 Wis. 2d 595

g. Successful collateral attack may breach plea agreement, if any, in that prior case

5) If TWO first offenses are pending

City of Kenosha v Jensen
184 Wis. 2d 91
(Ct. App. 1994)

a. If Def has two first-offense OWI/RCS/PAC cases pending, and is convicted of EITHER offense, other offense MUST be prosecuted as criminal offense

Note: Wis Ethics Opinion E-86-6

b. Defense counsel does not have an affirmative duty to disclose to Ct or prosecutor that there are two first-offense cases pending, unless specifically asked by Ct or prosecution

St v Kollross
2019 WI App 30
388 Wis. 2d 135

c. A pending Municipal Ct first-offense case does not toll statute of limitation if case later reissued as criminal case

City of Eau Claire v Booth
2016 WI 65
370 Wis. 2d 595

6) Def forfeits right to challenge a first-offense conviction in Circuit Ct (that should have been a second) by failing to raise the objection in a timely manner

§ 800.09(4)
City of Cedarburg v Hansen
2020 WI 11
390 Wis. 2d 109

7) Def forfeits right to challenge a first-offense conviction in Municipal Ct (that should have been a second) by failing to raise issue in writing and with specificity before entry of municipal judgment

C. Fine/Forfeiture

1) Ct must impose fine/forfeiture within range set by statute

§ 346.65(2)(g)1.

2) For 3rd and subsequent offense, minimum and maximum fines are doubled if Def had alcohol concentration of .17–.199%

§ 346.65(2)(g)2.

3) For 3rd and subsequent offense, minimum and maximum fines are tripled if Def had alcohol concentration of .20–.249%

§ 346.65(2)(g)3.

4) For 3rd and subsequent offense, minimum and maximum fines are quadrupled if Def had alcohol concentration above .25%

§ 973.05(1)
§ 345.47(1)
St ex rel Pedersen v Blessinger
56 Wis. 2d 286 (1972)

5) If Def indigent, must allow time to pay

§ 346.65(2e)

6) If Def does not have ability to pay, Ct may reduce costs, fine, or forfeiture and instead have Def pay amount of reduction toward assessment and treatment

§ 346.65(2)(f)2.

7) Minimum and maximum fines double for 2nd and subsequent convictions if passenger less than 16 years old is present in vehicle at time of offense

St v Neill
2020 WI 15
390 Wis. 2d 248

8) If enhancers for minor children and for high alcohol concentration both apply, minimum and maximum fines are increased by both enhancers, such that the base minimum and maximum fines are doubled for the presence of the minor children, then added to the amounts tripled or quadrupled based on the alcohol concentration

Example: If maximum fine is $600, that amount is doubled to $1,200. If the alcohol concentration supports quadrupling the fine, an additional maximum fine of $2,400 applies, yielding a total maximum fine of $3,600.

D. Cost for Withdrawal of Blood

§ 814.63(3m)(a), (d)

1) If Def required to appear in Ct, Ct shall impose costs paid by law enforcement for withdrawal of Def's blood but may not impose cost of alternative test provided free as provided in § 343.305(4)

§ 814.63(3m)(b)

2) If law enforcement has not yet paid or been charged, Ct shall impose amount reasonably expected to be charged

§ 814.63(3m)(c)

3) Ct shall disburse amount collected to the law enforcement agency

E. Imprisonment and Probation

§ 969.01(2)(a)

1) Release not allowed after conviction and before sentencing, if 3rd or subsequent conviction

§ 973.15(8)(a)3.

2) Ct may stay execution of jail sentence for not more than 60 days for criminal 1st and 2nd offenses

§ 973.15(8)(a)3.

3) Ct may NOT stay execution of jail sentence for 3rd or subsequent offense

§ 973.15(8)(a)1., 2.

a. Except if Def placed on probation or if Ct finds legal cause to delay sentencing

§ 346.65(7)

4) If convicted of second or subsequent OWI, Def required to remain in Cty jail for not less than 48-consecutive-hour period

§ 303.08(10r)

5) Def sentenced to jail with "Huber Law" privileges and subject to ignition interlock device (IID) order may not leave the jail unless, within 2 weeks after issuance of IID order, Def submits proof to sheriff that IID has been installed on each vehicle applicable to the order

§ 973.09(1)(d)

6) Ct may place Def on probation if mandatory minimum period of incarceration is imposed as a condition of probation, except in cases of 5th offense or higher

§ 346.65(2)(bm), (cm), (dm)

7) Minimum period of imprisonment may be reduced for 2nd, 3rd, or 4th offender if Def successfully completes probation that includes alcohol and other drug treatment

§ 301.03(20r)

a. DOC must provide treatment options for Defs convicted of a 2nd or 3rd offense with no waiting list for services

§ 346.65(2)(am)5.

8) A bifurcated sentence must be imposed on a 5th or 6th offense and the confinement portion shall be not less than 1 year and 6 months, unless Ct makes on-the-record finding that the best interests of the community will be served and the public will not be harmed

St v Shirikian
2023 WI App 13
406 Wis. 2d 633
pet for rev denied

a. The "best interests" determination still requires Ct to set initial confinement in prison for at least 1 year

b. Ct cannot impose and stay or withhold sentence

§ 346.65(2)(am)6.
St v Williams
2014 WI 64
355 Wis. 2d 581

9) A bifurcated sentence must be imposed on a 7th, 8th, or 9th offense and the confinement portion shall not be less than 3 years

§ 346.65(2)(am)7.

10) A bifurcated sentence must be imposed on a 10th or subsequent offense, and the confinement portion shall not be less than 4 years

St v Gramza
2020 WI App 81
395 Wis. 2d 215

11) Def must serve mandatory minimum period of confinement despite completing Substance Abuse Program (SAP)

St v Hoppe
2014 WI App 51
354 Wis. 2d 219

12) Ct may not impose ban on driving as a condition of extended supervision for a period exceeding the statutory maximum period of revocation

F. License Revocation

§ 343.31(1m), (3)(bm)

1) Ct must order revocation of license within range set by statute for the offense itself. DOT will increase period of revocation if less than minimum is ordered or if lifetime revocation is required because of timing of convictions

§ 345.48(2)

2) Revocation to start immediately upon conviction

§ 343.30(1r)
§ 343.305(10g)

3) Period of revocation ordered must be increased by number of days that Def is sentenced to jail or prison

§ 343.30(1q)(b)4m.
§ 343.305(10)(b)4m.

4) Minimum and maximum revocation periods double if passenger less than 16 years old is present in vehicle at time of offense

G. Occupational License

§ 343.10
Wis Adm Code
ch Trans 117

1) Primary responsibility for issuing occupational license is with DOT

St v Marcus
259 Wis. 543 (1951)

2) Issuance of occupational license, whether by DOT or Ct, is administrative function

§ 343.10(4)

a. Individuals who have been denied an occupational license by DOT may file petition in Ct in their Cty of residence

§ 343.10
see also § 351.07

3) All Defs applying for occupational license must make application at DOT, with exception of those suspended or revoked as Habitual Traffic Offender (HTO)

4) Waiting period to apply for occupational license

§ 343.30(1q)(b)2.

a. First offense—none

§ 343.30(1q)(b)3., 4.

b. Second and subsequent offenses—45 days

H. Ignition Interlock Devices (IID) and 24/7 Sobriety Programs

§ 343.301(1g)

1) Ct must order IID and/or 24/7 sobriety program if either of the following apply to Def:

§ 343.301(1g)(a) 1.

a. Improper refusal to take test; or

§ 343.301(1g)(a)2.

b. Convicted of OWI (§ 343.63(1)), OWI causing injury (Injury OWI, § 343.63(2)), OWI causing great bodily harm (GBH OWI, § 940.25), or OWI causing death (Homicide OWI, § 940.09) and had either

- An alcohol concentration of .15% or

Village of Grafton v Seatz
2014 WI App 23
352 Wis. 2d 747

- Prior OWI conviction during lifetime (even if outside 10-year period for 1st offense)

§ 343.301(1g)(am)

2) Ct must order one or more of the following:

§ 343.301(1g)(am)1.

a. That the Def's operating privilege for the operation of Class D vehicles be restricted to vehicles that are equipped with an IID AND each motor vehicle with Def's name on title or registration to be equipped with an IID

§ 343.301(1g)(am)2.

b. That the Def participate in a 24/7 sobriety program

- If Def completes or does not participate in 24/7 sobriety program, the Ct shall order the Def's operating privilege for the operation of Class D vehicles be restricted to vehicles that are equipped with an IID, shall specify the duration of the order, AND shall order that each motor vehicle with Def's name on title or registration be equipped with an IID

§ 165.957(4)(a)

— 24/7 sobriety programs limited to second and subsequent offenses

§ 165.957(2)

— DOJ has selected 5 counties to participate in pilot 24/7 sobriety programs: Green Lake, Manitowoc, Oneida, Racine, and Washburn Counties

§ 343.301(1m)

3) If equipping each owned or registered vehicle would cause undue hardship, Ct may order that one or more vehicles NOT be equipped with IID

§ 343.301(2m)

4) Def's operating privilege must be restricted for not less than one year nor more than the maximum revocation period permitted for the conviction, except, if maximum revocation period is less than one year (i.e., for 1st

offense), the restriction must be for one year

a. Time period for IID license restriction begins on the date the Ct issues the IID order and extends for a period of not less than one year after the date the DOT issues any license granted under Ch 343

§ 347.50(1t)

b. Ct shall extend IID license restriction for 6 months for each violation of § 347.413(1) (tampering, removing, disconnecting, failing to install, or not following the IID license restriction)

5) When ordering each motor vehicle with Def's name on title or registration to be equipped with an IID, Ct may specify the date by which the IID shall be installed

§ 343.301(2m)(b)

6) If the Ct orders only a 24/7 sobriety program, the Ct shall order that the time period during which the person participates in the program equal not less than one year nor more than the maximum revocation period permitted for the conviction, except that if the maximum revocation period is less than one year, the time period shall equal one year

§ 343.301(2m)(b)

7) If the Ct orders an IID license restriction because the Def completes or does not participate in the 24/7 sobriety program, the time period begins on the date the DOT issues any license. The Ct may order the person to install an IID immediately after participation in the 24/7 program ends or while the person completes the 24/7 program and for the additional required period of time. The Ct shall notify DOT of the date the Def's participation ended and the duration of the order restricting the operating privilege

§ 343.301(2m)(b)

a. Def shall, within 2 weeks after the date on which installation of an IID is required, submit proof to the sheriff in the Cty of residence that an IID has been installed

§ 343.301(3)

8) Def is liable for reasonable cost to equip and maintain IID, except

§ 343.301(3)(c)

a. If Ct finds Def has household income below 150% of poverty guidelines, Def's costs limited to one-half actual cost to install and maintain

§ 343.301(5)

9) Ct must impose $50 ignition interlock surcharge

I. Assessment

§ 343.30(1q)(c)
§ 343.305(10)(c)

1) Ct must order assessment if Def convicted of OWI/PAC/RCS or found to have unreasonably refused chemical test

2) Wis residents to be referred to approved facility in Cty of residence

3) Out-of-state residents to be referred to approved facility in Wis. Facility in Wis may refer Def to facility in Def's home state

§ 343.30(1q)(c)1m.

4) Def may undergo voluntary assessment before conviction

a. Ct may consider at sentencing

§ 346.65(2e)

5) Ct may reduce Def's fine or forfeiture by amount sufficient to have Def pay assessment and treatment under § 343.30(1q)(c)

§ 343.10(2)(e)

6) Def must complete assessment and begin compliance with Driver Safety Plan before getting occupational license after second or subsequent conviction or refusal

J. Community service

§ 973.03(3)

1) Ct may order Def to perform community service equal to 1 day of jail for 3 days of community service

§ 346.65(2g)

2) Ct may order Def to perform community service in lieu of part or all of forfeiture or fine

§ 346.65(2g)

3) Ct may order Def to perform community service in addition to other penalties

K. Restitution

Wis Const art I, § 9m
§ 346.65(2r)
§ 973.20

1) Ct may order Def to pay restitution to any victim(s) of the OWI offense

§ 343.05

3. Operating Without a Valid License (OWL)

§ 343.05(3)
§ 343.05(4)(b)1m.

A. No person may operate a motor vehicle upon a highway unless the person has a license that is not revoked, suspended, cancelled, or expired. This includes mopeds and motor bicycles but does not include limited use off-highway motorcycles

Wis Adm Code
§ Trans 102.14(4)

1) Persons who establish Wis residency shall apply for a driver's license within 60 days, or 30 days if they hold a CDL from another jurisdiction

§ 343.01(2)(g)

2) "Resident" means "an adult whose one home and customary and principal residence, to which the person has the intention of returning whenever he or she is absent, is in this state"

§ 343.05(4)(b)1.

3) Nonresidents of Wis are exempt from the requirement that they possess a valid Wis license if they possess a valid operator's license issued in their home jurisdiction

§ 343.05(4)(b)2., 3., (c)

4) Certain nonresidents of the United States, including those holding a valid Mexican driver's license, are exempt from the requirement that they possess a valid Wisconsin license. This exemption applies for only one year after a nonresident's arrival in the United States and does not apply to someone who has been a Wisconsin resident for more than 60 days

B. Penalties

§ 343.05(5)(b)1.

1) First offense within 3 years is a civil forfeiture not to exceed $200

§ 343.05(5)(b)1.

2) Second offense within 3 years carries up to $300 fine and up to 30 days in jail

§ 343.05(5)(b)1.

3) Third offense within 3 years carries up to $500 fine and up to 6 months in jail

§ 343.05(5)(b)4.

4) If, in the course of committing the offense, Def causes GBH to another person, Def must forfeit $5,000–$7,500

§ 343.05(5)(b)4.

5) If Def causes GBH and knows at the time of the violation that Def does not possess a valid operator's license, Def is guilty of a Class I felony

§ 343.05(5)(b)5.

6) If, in the course of committing the offense, Def causes death to another person, Def must forfeit $7,500–$10,000

§ 343.05(5)(b)5.

7) If, in the course of committing the offense, Def causes death, and knows at the time of the violation that Def does not possess a valid operator's license, Def is guilty of a Class H felony

§ 343.30(1d)

8) If Def is convicted of offense involving GBH or death, Ct shall revoke license for 6 months, or for a lesser period if reasons for reduction are put on the record

4. Operating While Suspended (OWS)

§ 343.44(1)(a), (1g)

A. No person whose operating privilege has been suspended may operate a motor vehicle upon any highway during the period of suspension or in violation of any restriction on an occupational license issued to the person during the period of suspension. A person's knowledge that his or her operating privilege is suspended is not an element of the offense. Notwithstanding any specified term of suspension, the period of any suspension continues until the license is reinstated

B. Penalties

§ 343.44(2)(d)

1) Chief Judge of district shall adopt guidelines for the consideration of aggravating and mitigating factors

§ 343.30(1g)(a), (b), (d)

2) Ct may suspend Def's operating privilege for up to 6 months. But if Def has 3 or more prior convictions for either OWS or OAR, Ct may revoke Def's operating privilege for 6 months, or for a lesser period if reasons for reduction are put on the record

§ 343.30(1g)(c), (d)

3) If Def is convicted of offense involving GBH or death, Ct shall revoke for 6 months, or for a lesser period if reasons for reduction are put on the record.

5. Operating After Revocation (OAR)

§ 343.44(1)(b), (1g)

A. No person whose operating privilege has been revoked may operate a motor vehicle upon any highway during the period of revocation or in violation of any restriction on an occupational license issued to the person during the period of revocation. A person's knowledge that his or her operating privilege is revoked is not an element of the offense. Notwithstanding any specified term of revocation, the period of revocation continues until the license is reinstated

B. Penalties

§ 343.44(2)(d)

1) Chief Judge of district shall adopt guidelines for the consideration of aggravating and mitigating factors

§ 343.44(2)(b)

2) Ct may review the record and consider:

a. The aggravating and mitigating factors set in the guidelines

b. The class of vehicle operated

c. The number of prior convictions for OWS/OAR within the prior 5 years

d. The reason that the person's operating privilege was revoked/suspended/disqualified, including whether the operating privilege was revoked for an OWI offense

e. Any convictions for other moving violations arising out of the incident

§ 343.30(1g)(a), (b), (d)

3) Ct may suspend Def's operating privilege for up to 6 months. But if Def has 3 or more prior convictions for either OWS or OAR, Ct may revoke for 6 months, or for a lesser period if reasons for reduction are put on the record

§ 343.30(1g)(c), (d)

4) If Def is convicted of offense involving GBH or death, Ct shall revoke for 6 months, or for a lesser period if reasons for reduction are put on the record

Ch 351

6. Criminal—Habitual Traffic Offender (HTO)

§ 343.44(2)(c)
§ 351.08

A. In addition to regular applicable penalties for OAR, if Def revoked as HTO, penalties enhanced by fine not to

exceed $5,000 and imprisonment not to exceed 180 days

§ 343.44(2)(c)

B. Before trial on any charge of OAR/OWS, or no DL, Ct must hold hearing to determine whether Def is HTO

§ 351.025

C. Def will be revoked by DOT for 5 years as HTO if

§ 351.02(1)(a)

1) 4 or more convictions in 5-year period for serious offenses designated in § 351.02(1)(a); or

§ 351.02(1)(b)

2) 12 or more moving traffic regulation violations in 5-year period. Convictions received by DOT on or after 7/27/05 must be for violations of Ch 346, including violations under § 351.02(1)(a)

§ 351.027(2)

D. Def may challenge HTO revocation by filing petition with Circuit Ct in Cty of residence. Petition to be filed in Dane Cty if Def not Wis resident

1) Ct to determine at hearing whether Def is person named in DOT records and whether Def actually convicted of each offense shown on record

§ 351.05

2) Ct may refer decision on whether Def actually convicted of specific offense to Ct where conviction entered. Ct to which matter is referred must conduct hearing to determine issue and notify original Ct of decision

7. Civil Postconviction Motions

§ 345.50(2)

A. Motion for stay pending appeal

1) Discretionary

2) May require appeal bond

3) Bond required may not be more than maximum forfeiture plus costs

B. Report to DOT pending appeal

§ 345.48(1m)

1) Ct forwards record of conviction within 5 working days

§ 345.48(4)

2) If notice of appeal filed, forward certificate to DOT within 5 working days after filing

§ 345.51

C. Reopening default judgments in civil traffic cases

1) Includes plea of guilty, plea of no contest, and forfeiture of deposits

2) Notice and motion must be filed in writing, showing good cause, within 6 months after entry of judgment